Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 340).

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 323.

UNITED STATES OF AMERICA, EX REL. DAVID DARCY, PETITIONER,

vs.

EARL D. HANDY, WARDEN OF BUCKS COUNTY PRISON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 15, 1955

CERTIORARI GRANTED OCTOBER 24, 1955

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I.

RELEVANT DOCKET ENTRIES.

April 3, 1951. Petition for Writ of Habeas Corpus and Rule to Show Cause.

April 3, 1951. Order of Court (FVF) fixing Thursday the fifth day of April 1951, at ten o'clock A. M. at Scranton for a hearing on petition. Further ordered and decreed that the execution of the death penalty be stayed and continue to be so stayed until after the court has acted and finally disposed of the petition, and that respondents produce body of the relator at the time and place fixed hereby for said hearing.

April 3, 1951. (Nunc pro tunc) (Received in Clerk's Office April 17, 1951)

Answer of John W. Claudy, Warden of Western State Penitentiary to petition for writ of Habeas Corpus.

April 5, 1951. Hearing held in Scranton before Hon. Albert L. Watson and Hon. John W. Murphy.

April 5, 1951. Order that the stay of execution heretofore granted be continued until 10:00 A. M. Tuesday, April 10, 1951. In the event that the Supreme Court of Pennsylvania does not grant a stay of execution, it will be necessary for further application to be made to this Court before the stay order is continued (ALW) (JWM).

April 11, 1951. Order that petition for writ of habeas corpus and rule to show cause, filed April 3, 1951, is dis-

missed, and that prayer of relator for a stay of execution is denied. Memorandum opinion will be filed forthwith (ALW) (JWM).

April 11, 1951. Notice of Appeal of the Order entered this date.

April 14, 1951. U. S. Court of Appeals, Docket No. 10,447. Certified copy of U. S. Court of Appeals order staying execution of Darcy pending hearing and determination of Appeal.

May 17, 1951. Opinion of Court re relator's petition for a writ of Habeas Corpus and a stay of execution, and the Commonwealth of Pennsylvania's motion to dismiss the petition as insufficient at law (M) and Concurrence of Judge Watson.

March 25, 1953. Opinion "The Judgment of the Court below will be reversed with the direction to enter an order staying Darcy's execution until the disposition by the Court below of the instant case on remand on the issue of alleged hysteria and prejudice. The Court below will be directed to strike from the petition for habeas corpus the jurors' letters attached thereto. The stay order entered by this Court will be vacated" (USC of A).

March 28, 1953. (Biggs, Chief Judge, U. S. Court of Appeals)

"The opinion of Chief Judge Biggs filed on March 24, 1953, in the above entitled case, is hereby amended as follows:

"By inserting the phrase 'what he believed to be' before the word 'his' in the 22nd line of page 14 of the printed opinion." Biggs, Chief Judge.

November 4, 1953. Mandate—the judgment of the said District Court in this case be, and the same is hereby reversed, with direction to enter an order

staying Darcy's execution until the disposition by the court below of the instant case on remand on the issue of alleged hysteria and prejudice; and to strike from the petition for habeas corpus the jurors' letters attached thereto. Copies of mandate handed to Judge Watson and Judge Murphy.

November 5, 1953. Order—It is hereby ordered and decreed that the execution of the death penalty of David Darcy be stayed and continue to be so stayed until after this Court has acted upon and finally disposed of the petition of David Darcy seeking a writ of habeas corpus (W and M).

January 22, 1954. Clerk's minutes—conference of attorneys of record and Judge Murphy to fix a date for hearing. Date fixed 2-17-54, at 10:00 A. M. at Scranton, Pa.

February 10, 1954. Order continuing hearing from 2-17-54 to 3-9-54, at 2:00 P. M. at Scranton, Pa. (M).

February 17, 1954. Order continuing hearing from 3-9-54 to 3-11-54, at 10:00 A. M. at Scranton, Pa. (M).

March 5, 1954. Motion of Attorney General of Pennsylvania to discharge Rule to Show Cause.

Notice that Motion discharge Rule will be brought on for hearing 3-11-54, at 10:00 A. M.

Order directing the Attorney General of Pennsylvania to produce the person of David Darcy at the U. S. Court in Scranton, Pa., at 10:00 A. M. on 3-11-54 (M).

March 11 to 20, 1954, inclusive. Clerk's Minute Sheets of proceedings held on March 11, 12, 13, 16, 17, 18, 19 and 20th, 1954.

March 12, 1954. Order that the jurors' letters attached to the petition for Habeas Corpus be and they are hereby stricken from the record (W & M).

March 16, 1954. Relator's Motion to amend petition for writ of Habeas Corpus and Rule to Show cause, and Order allowing motion (M).

May 28, 1954. David Darcy's Petition to reopen hearing.

June 12, 1954. Motion to Dismiss Petition to Reopen Hearing and Notice that Motion will be brought on for hearing at Scranton, Pa., on June 28, 1954, at 2 o'clock P. M.

July 10, 1954. Affidavit of Ernest M. Leedom.

July 12, 1954. Affidavit of C. LeRoy Murray, and Affidavit of Walter C. Schroeder.

August 5, 1954. Affidavit of J. Dress Pannell, Affidavit of Inez D. Heckman.

October 8, 1954. Transcript of Proceedings held March 11, 12, 13, 16, 17, 18, 19, 20, 1954.

November 10, 1954. Order that Relator's Petition to reopen hearing is denied (W & M).

Order that the Court being advised that the transcript of Testimony in this case having been filed and copies thereof forwarded to respective counsel of record, Court fixed Friday, December 3, 1954, at 11:00 A. M. Scranton, Pa. Court Room No. 2, as the time and place for hearing argument and the submission of requests for findings of fact and conclusions of law (W & M).

December 3, 1954. Clerk's Minute Sheet re arguments on Findings of Facts and Conclusions of Law. Court to render decision later.

February 12, 1955. Opinion re relator's petition for writ of Habeas Corpus (M & W).

Order that for reasons set forth in an opinion handed down this date, relator's petition for a writ of Habeas Corpus is denied, and the stay order entered by this Court heretofore, to wit, on the

5th day of November, 1953, is hereby terminated (M & W).

February 18, 1955. Notice of Appeal from order of Feb. 12, 1955. Clerk's Minute Sheet—re hearing on Motion for Certificate of Probable Cause.

February 19, 1955. Appendix to Opinion (M).

February 21, 1955. Order that relator's request for Certificate of Probable Cause is hereby denied (M).

February 24, 1955. Card from U. S. Court of Appeals acknowledging receipt of Notice of Appeal.

II.

PLEADINGS.

(1)

PETITION FOR WRIT OF HABEAS CORPUS AND RULE TO SHOW CAUSE.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA:

The petition of David Darcy respectfully represents:

1. That the relator was indicted for the murder of William Kelly in the Court of Oyer and Terminer of Bucks County, to No. 37, February Term, 1948, and upon entering a plea of not guilty was tried before the Honorable Hiram H. Keller and a jury, wherein the jury returned a verdict

of guilty of murder in the first degree and fixed the penalty at death.

2. At such trial, the relator was not permitted by his counsel to take the witness stand in his own defense nor did his counsel produce any witnesses as to the background, or personal history, or mental condition, or previous good behavior, or character, or reputation of the relator. All of which evidence was readily available, favorable to the relator and would have had great influence with the jury in their determination of the guilt and punishment of the relator.

3. That the Court of Oyer and Terminer of Bucks County denied the relator a new trial and affirmed the conviction and judgment of sentence.

4. That upon appeal to the Supreme Court of Pennsylvania, such conviction and judgment of sentence were affirmed in an opinion by the late Chief Justice Maxey, reported in Commonwealth vs. Darcy, 362 Pa. State Reports, 259, to which Justice Jones dissented.

The majority opinion contained the statement that "he (Darcy) did not testify and no evidence was given in his behalf."

5. That a petition was presented in behalf of the relator to the Supreme Court of the United States for a certiorari, which was denied without opinion.

6. That an application was made by the relator to the Board of Pardons for clemency, which was finally refused on March 21, 1951, and the request for a rehearing denied on March 31, 1951.

Petition for Writ of Habeas Corpus and Rule to Show Cause.

7. That the Governor of Pennsylvania, by executive order, directed that the relator be removed from the Bucks County Prison to the Western State Penitentiary at Rockview, Center County, Pennsylvania, to carry out the sentence of death during the week beginning April 2, 1951, and later by special order of April 1, 1951, directed the warden of the Western State Penitentiary not to proceed with the execution of such judgment of sentence until April 4, 1951, so that a petition for a rule for reargument could be presented on April 2, 1951, to the Supreme Court of Pennsylvania on behalf of the relator.

8. That such petition was filed on April 2, 1951, with the Prothonotary of the Supreme Court of Pennsylvania, which was entered to No. 429, Miscellaneous Docket, No. 9, and the Supreme Court refused on April 3, 1951, to grant the prayer of such petition and issue the rule as requested.

9. That the relator is still confined in the Western State Penitentiary for the purpose of carrying out such sentence of death and under the special executive order of the Governor of April 1, 1951, will go to his death at 0001 a. m. on Wednesday, April 4, 1951.

10. That the relator is so restrained and confined under sentence of death unlawfully imposed in violation of the guarantees of a fair and impartial trial afforded by the Constitution and contrary to the due process clause and the Fourteenth Amendment to the United States Constitution.

11. That the relator did not have a fair and impartial trial as is contemplated and guaranteed by the Constitution, for the reason among others:

That the relator was placed on trial at Doylestown on June 7, 1948, the week following the trial of the co-defendants, Harry Zeitz and Harold Foster, who were found guilty on June 4, 1948 of murder in the first degree and the penalty fixed at death. Zeitz was the one who actually fired the shot which killed William Kelly.

That upon the conviction by the jury of Zeitz and Foster, Judge Calvin S. Boyer, who presided at such trial, openly and publicly praised the jury for their verdict and the local newspaper, the "Doylestown Daily Intelligencer", carried on its first page an article which stated that:

> "Judge Boyer praises the jury for verdict condemning two killers to electric chair. Court tells eight men and four women he could not see how any other course could have been taken—two defendants appear to be unmoved", and included therein an actual quotation attributed to Judge Boyer, which is as follows:
>
> "I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. The only hope of stemming the tide of such crime by youth is to impose the law which you have indicated by your decision."

That the hysteria and prejudice, which swept the town and County of Bucks, as the result of the Zeitz and Foster trial and verdict, was so general as to influence beyond a slight degree those jurors included in the panel from whom the jurors who actually tried the relator upon the charge of murder were selected.*

---

* Amendment allowed March 16, 1954.

That nevertheless instead of postponing the relator's trial in the interest of a fair and impartial trial, until a later date when the relator could have been tried in an atmosphere of judicial calmness unaffected and uninfluenced by the developments in and the reactions of the immediately preceding trial of the relator's co-defendants, the relator was forced to go to trial on Monday, June 7, 1948, before Judge Hiram H. Keller and jurors, who had been drawn from a second panel and were familiar with what had transpired during the prior week in the Zeitz and Foster trial and the relator's connection therewith and the judge's utterances and the public and newspaper comments thereon.

That during the course of the relator's trial, Judge Boyer, who had presided at the Zeitz and Foster trial, and had publicly congratulated and commended the jurors on their verdict in that case, appeared at different times in the court room, where he could be plainly seen and observed by the jury trying the relator, and at times sat upon the bench and assisted and conferred with Judge Keller in the conduct of the trial of the relator and at other times elsewhere in the court room, but at all times the presence of Judge Boyer reminded the jurors serving in the relator's trial of the trial of Zeitz and Foster and the expressed commendatious attitude of Judge Boyer toward that verdict.

That during the course of the trial of the relator, Judge Boyer on June 12, 1948, in sentencing to prison a young man from Philadelphia by the name of Robert White, age 18 years, who had pleaded guilty to stealing a car radio out of an automobile, said:

> "We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which isn't being watched. What business did you have to come up here in

the first place? So far as your testimony is concerned, you have not shown any excuse here at all to come out of Philadelphia to Bucks County",

and such statement appeared as an actual quotation from Judge Boyer in the issue of the "Doylestown Daily Intelligencer" of June 12, 1948.

Judge Boyer had been on the Bucks County bench for a number of years, was well respected throughout the county, and his statements and actions would be definitely reflected in the jury box and would be prejudicial to their relations in having a fair and impartial trial.

12. That the relator did not have a fair and impartial trial as is contemplated and guaranteed by the Constitution for the reason among others:

That the relator was not permitted by his counsel to take the witness stand in his own defense and neither did his counsel produce any witnesses as to the background, personal history, mental condition, prior good behaviour, character and reputation of the relator.

That it was the duty of counsel for the relator to prepare the case of the relator and to make or caused to be made such investigations as may be necessary and thereupon to introduce all evidence and testimony, which would be helpful to the jury in determining the guilt or innocence of the relator and in fixing the punishment under the law.

That recently many reputable citizens have written letters, which are attached and collectively referred to as Exhibited A, indicating their opinion as to the good reputation of the relator prior to becoming involved with the three other co-defendants.

That when such letters, as well as other information, were

shown to the jurors, who tried the relator and found him guilty of murder in the first degree with the death penalty, six of such jurors clearly indicated in letters that, had the relator taken the witness stand in his own defense or had his counsel produced evidence of good reputation, they would have fixed the penalty at life imprisonment instead of death.

That excerpts from the letters of such jurors, which are attached and referred to collectively as Exhibit B, are as follows:

(a) Letter of Ruth G. Bliss: "If I personally had the information about his reputation and character prior to this trial, which I have since become acquainted with, I would have voted for life imprisonment rather than the extreme penalty."

(b) Letter of Jesse H. Horne: "Had his life's record been revealed to me, I would have voted for life imprisonment."

(c) Letter of Ann L. Reed: "If I had heard the defendant's side of the story, I would have voted for life imprisonment."

(d) Letter of L. Calvin Fluck: "If I had had this information at the time of the trial, and could have had it revealed to me that his reputation prior to the time he became involved in his short career of crime, I would have voted for life imprisonment instead of the death penalty."

(e) Letter of Howard Price: "Had I known more about the defendant's background, I would have voted for life imprisonment."

(f) Letter of Anna W. Bucher: "My vote would have been for life imprisonment had I had any such knowledge of his good reputation prior to this trouble."

That other of the jurors indicated in their letters, which are attached and referred to collectively as Exhibit C, as follows:

> "There was only one conclusion we could come to when no defense was made and no character witnesses offered in that his character was so bad that it would not have helped in his case and that the lawyer who was fighting for his life would not have overlooked anything so important if there was anything to offer in the way of character and character witnesses." They also indicated that "having read letters from prominent people in the community," they believed "that the counsel for the defense erred, in not having character witnesses testifying in his behalf and thereby did did an injustice to David Darcy."

That counsel for the relator was not diligent in failing to introduce those witnesses, who would have testified as to the prior good reputation of the relator.

That since the trial of the relator, examinations have been made of the relator by Dr. A. Ornsteen, and Dr. Carl J. Hoffman, both of Philadelphia, and each has submitted a report thereof, which are attached and referred to collectively as Exhibit D. Dr. Ornsteen is a qualified, outstanding and well known psychiatrist, who states in his report that:

> The relator is "a psychopathic personality type of individual; showing indications of being very easily swayed and persuaded to go along and act impulsively and without consideration of possible serious result to himself and others; that the numerous physical ailments in his early life topped by a year in bed and

house confinement for a heart malady laid the groundwork for an inferiority feeling reaction which later required a superiority reaction compensation. This was very likely a strong part of the emotional drive which motivated his participation in crime."

That from the history of the relator's case as disclosed by the reports of Dr. Ornsteen and Dr. Hoffman, it appears that the relator had suffered head injuries and had become despondent because he was rejected by the Navy and later classified as 4F. It was the reasonable duty and obligation of counsel for the relator to have these and other essential facts investigated by a psychiatrist and if the results of such examination warranted it, then it was the further duty and obligation of counsel for the relator to have the psychiatrist to testify as to the results thereof before the court and jury, which testimony would have been helpful to the jury in passing upon the guilt or innocence of the relator and in fixing the penalty at death or life imprisonment. Counsel for the relator neglected to have the relator examined by a psychiatrist, and if the relator had been so examined, the psychiatrist would have testified, as Dr. Ornsteen reported, that the relator was easily led and a psychopathic personality.

13. That these facts, if the relator and other witnesses had been called to the witness stand by counsel for the relator, would have gone to and had a direct bearing upon the issue before the jury not only in determining the guilt or innocense but also in fixing the penalty.

14. That the relator is entitled to have a fair and impartial trial and also to have submitted to the jury all the facts

and all the circumstances. The failure of counsel for the relator to present a defense in the behalf of the relator or to call character or other witnesses for him "offends against the fundamentals of a fair and impartial trial", according to the Supreme Court of Pennsylvania in the case of the Commonwealth v. O'Brien, reported in 312 Pa. State Reports, 543 (546).

15. That Earl D. Handy is the warden of the Bucks County Prison at Doylestown, Pennsylvania; Dr. John W. Claudy, the warden of the Western State Penitentiary at Rockview, Center County, Pennsylvania; and Carl H. Fleckenstine, the United States Marshall for the Middle District of Pennsylvania.

16. That the relator because of his present confinement to the Western State Penitentiary is unable to execute personally this petition and consequently the same has been executed by his counsel.

Wherefore, the relator contending that, under the allegations hereof, he is about to be put to death in violation of due process of law and the Fourteenth Amendment to the Constitution of the United States, prays:

(1) That a writ of habeas corpus be granted and awarded for the release of the relator from confinement pursuant to the judgment of death sentence, directed to Earl D. Handy, Warden of the Bucks County Prison, and Dr. John W. Claudy, Warden of the Western State Penitentiary, demanding them to have the body of the relator before your Honorable Court immediately, to do, submit to and receive what your Honorable Court may consider right, and likewise directing the said Earl D. Handy and Dr. John W. Claudy to make re-

turn certifying specifically and fully the true cause of commitment and detainer;

and

(2) That an order staying the execution of the death penalty upon the relator and other proceedings thereunder be granted and awarded, until your Honorable Court shall have acted upon and finally disposed of this petition.

And he will ever pray.

DAVID DARCY,
Relator,
By: /s/ CHARLES J. MARGIOTTI,
/s/ MORTON WITKIN,
/s/ J. DRESS PANNELL,
Attorneys for Relator, David Darcy.

State of Pennsylvania
County of Philadelphia } ss.

On this 3rd day of April, 1951, before me the subscriber, a Notary Public in and for the said County and State, personally appeared Morton Witkin and J. Dress Pannell, who being severally duly sworn according to law, each depose and say: That the facts set forth in the foregoing petition are true and correct so far as the same are based upon personal knowledge; and so far as the same is based upon information and belief, they believe them to be true and correct.

/s/ MORTON WITKIN
/s/ J. DRESS PANNELL.

Answer of John W. Claudy, Warden of Western State Penitentiary, to Petition for Writ of Habeas Corpus

Sworn to and subscribed before me, the day and year first aforesaid.

/s/ MARIAN R. FORD,
Notary Public.

(Seal)

My Commission Expires Feb. 1st, 1953.

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(2)

ANSWER OF JOHN W. CLAUDY, WARDEN OF WESTERN STATE PENITENTIARY, TO PETITION FOR WRIT OF HABEAS CORPUS.

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

AND NOW, to wit, this 16th day of April, 1951, comes John W. Claudy, Warden of Western State Penitentiary, by Robert E. Woodside, Attorney General of Pennsylvania, and answering said petition, nunc pro tunc, as of April 3, 1951, says:

1. Admitted.

2. It is admitted that the relator did not testify or introduce any evidence in his defense on the trial of the indictment. It is denied that his counsel, an able, skilful and competent trial lawyer would, or did, coerce, or intimidate, or prevent the relator from testifying or introducing any

evidence in his behalf. On the contrary, it is averred that the trial strategy was not due to any lack of diligence or professional competency on the part of his counsel, but rather to a careful and well considered plan arrived at only after collaboration with other very able and competent trial counsel. It is further averred that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding. Deggs v. Welch (U. S. C. A., D. C., 1945), 148 F. 2d 667; Morton v. Welch (C. C. A. 4, 1947), 162 F. 2d 840, 841; Burkett v. Mayo (C. C. A. 5, 1949), 173 F. 2d 574; Andrew v. Robertson (C. C. A. 5, 1944), 145 F. 2d 101, 102; Jones v. Dowd (C. C. A. 7, 1942), 128 F. 2d 331, 332; United States, ex rel., Feeley v. Ragen (C. C. A. 7, 1948), 166 F. 2d 976, 980-981; United States, ex rel., Weber v. Ragen (C. C. A. 7, 1949), 176 F. 2d 579, 586; Sweet v. Howard (C. C. A. 7, 1946), 155 F. 2d 715; Miller v. Hudspeth (C. C. A. 10, 1949), 176 F. 2d 111, 119-120; Farrell v. Lanagan (C. C. A. 1, 1948), 166 F. 2d 845, 847; Tompsett v. State of Ohio (C. C. A. 6, 1944), 146 F. 2d 95, 98; Hudspeth v. McDonald (C. C. A. 10, 1941), 120 F. 2d 962, 968; Helms v. Humphrey (D. C., Minn., 1945), 63 F. Supp. 4; Ex parte Smith (D. C. N. D., Pa. 1947), 72 F. Supp. 935, 940.

3. Admitted.

4. Admitted.

5. Admitted: See 338 U. S. 862.

6. Admitted. It is averred that said application for executive clemency, by necessity, admitted the validity of the judgment, now, for the first time, in this proceeding, claimed

to be void for the reason specified notwithstanding that it was challenged in a habeas corpus proceeding in the Supreme Court of Pennsylvania, on other grounds and the Supreme Court of the United States denied certiorari to review the judgment of the Supreme Court of Pennsylvania denying a writ of habeas corpus (See 338 U. S. 862).

8. Admitted. It is averred, however, that said Petition for Reargument set forth substantially the same grounds alleged in this proceeding; that, had the Supreme Court of Pennsylvania been of opinion that there was any merit to the contentions; it, unquestionably, would have exercised its power, under the Acts of May 22, 1722 (1 Sm. Laws 140), and June 16, 1836, P. L. 785, "to minister justice to all persons" (See Commonwealth v. Ragone, 317 Pa. 113, 126-128, 176 Atl. 454 (1935)) and treated it as a petition for a writ of habeas corpus; that, since the Supreme Court of Pennsylvania refused the petition, the only deducible inference is that it felt that there was no merit to it.

9. Admitted. It is further averred that on April 3, 1951, execution of the sentence was stayed pursuant to the order of your Honorable Court, pending the determination of this proceeding; that on April 11, 1951, your Honorable Court dismissed the petition and refused a further stay of execution; that on the same day, to wit, April 11, 1951, the United States Court of Appeals for the Third Circuit granted the relator leave to appeal from the order of your Honorable Court dismissing the petition; and issued a stay of execution pending disposition of said appeal.

10. Denied. On the contrary it is averred that the relator was not denied due process of law in contravention of the

Answer of John W. Claudy, Warden of Western State Penitentiary, to Petition for Writ of Habeas Corpus

Fourteenth Amendment of the Constitution of the United States in the proceeding eventuating in the judgment and sentence of death.

11. It is denied that the relator was denied a fair and impartial trial in contravention of the Fourteenth Amendment of the Constitution of the United States.

It is admitted that the relator was placed on trial following the conviction of his co-defendants of murder in the first degree, with the penalty fixed at death.

The respondent has no knowledge of the truth or falsity of the allegation with respect to the alleged remarks of Judge Calvin S. Boyer to the jury which tried the relator's co-defendants following the rendition of its verdict and the alleged publication thereof in the "Doylestown Daily Intelligencer" and, therefore, neither admits nor denies the same, but, if material and relevant, demands proof thereof at the trial. It is averred, however, that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding, since it could and should have been raised in the appeal from the conviction or, at the very least, in the prior application for a writ of habeas corpus.

It is denied that as a result of the verdict in the trial of relator's co-defendants hysteria and prejudice was so general as to influence the jurors included in the panel from which the jury who tried the relator on the indictment in the Court of Oyer and Terminer of Bucks County at No. 37 February Term, 1949, from rendering a verdict other than on the evidence and the law. On the contrary, it is averred, that the voir dire examination of the jurors who were selected to try the relator on said indictment which this court not only has a right, but also a duty to examine

(Dorsey v. Gill (U. S. C. A., D. C., 1945), 148 F. 2d 857, 870), clearly indicates that they, the jurors, selected were not prejudiced or influenced by the trial of the relator's co-defendants, or by any matter connected therewith, and could reach a verdict solely on the basis of the evidence and the law applicable thereto. It is further averred that the relator, who was represented at his trial by an able, skillful and competent trial lawyer (See the Charge of the Trial Court and the Opinion of the Supreme Court of Pennsylvania. Commonwealth, ex rel., Darcy v. Claudy (Exhibit A)), made no application either to the trial court or the Supreme Court of Pennsylvania for a change of venue. It is averred that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding. Cf. Wallace v. United States (C. C. A. 8, 1949), 174 F. 2d 112; Bard v. Chilton (C. C. A. 6, 1927); 20 F. 2d 906; United States, ex rel., Buckhalter v. Lowenthal (C. C. A. 2, 1940), 108 F. 2d 863; United States, ex rel., Bongiorno v. Ragen (C. C. A. 7, 1945), 146 F. 2d 349, 352.

It is admitted that the relator's trial was not postponed. It is averred, however, that no application for a postponement was made to the trial court, and that there was no reason whatever, as indicated by the voir dire examination of the jurors selected to try the relator, why the trial court should have made such an order sua sponte. It is denied that the jurors who were selected to try the relator were familiar with the trial of the relator's co-defendants, the court's alleged utterances to that jury, or the alleged newspaper comments thereon. It is averred that the voir dire examination of the jurors *conclusively* rebut the said allegation. It is further averred that said allegation is irrelevant, immaterial and is not open to inquiry in this proceeding.

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It is admitted that Judge Calvin S. Boyer, who presided at the trial of the relator's co-defendants, on one occasion, set on the bench with President Judge Keller, who was presiding at the trial of the relator. It is averred, however, that said allegation is immaterial, irrelevant and not open to inquiry in this proceeding since it was a matter of record and not only could, but also should have been presented, if it were felt that it constituted error, in the appeal, from the conviction, to the Supreme Court. Sanderlin v. Smyth (C. C. A. 4, 1943), 138 F. 2d 729; United States, ex rel., Jackson, et al. v. Brady (C. C. A. 4, 1943), 133 F. 2d 476. The respondent has no knowledge of the number of occasions on which Judge Boyer may have entered the court room during the trial of the relator, or the effect of his presence therein on the jury trying the relator, and, therefore, neither admits nor denies the allegation with respect thereto, but, if deemed material and relevant, demands proof thereof at the trial of cause. It is averred, however, that Judge Boyer's presence in the court room during the trial of the relator was neither irregular nor improper and, in no sense of the word, operated to deny the relator due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States, in his trial.

The respondent has no knowledge of the truth or falsity of the remarks attributed to Judge Boyer in pronouncing sentence upon a defendant in a wholly unrelated proceeding and, therefore, neither admits nor denies the same, but, if deemed relevant and material, demands proof thereof at the trial of the cause. It is averred, however, that said allegation is irrelevant, immaterial and is not open to inquiry in this proceeding.

Answer of John W. Claudy, Warden of Western State Penitentiary, to Petition for Writ of Habeas Corpus

12. Denied. On the contrary, it is averred that the relator was not denied any constitutional right on the trial of the indictment eventuating in the judgment and sentence of death. It is further averred that said allegation is irrelevant, immaterial, and not open to inquiry in this proceeding. See paragraph 2 of this Answer which is incorporated by reference herein; Rakes v. United States (C. C. A. 4, 1948), 169 F. 2d 739.

13. The respondent has no knowledge of the truth or falsity of this allegation, and neither admits nor denies the same, but, if deemed material and relevant, demands proof thereof at the trial of the cause. It is averred that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding.

14. Denied, as averred. It is admitted that the Fourteenth Amendment of the Constitution of the United States forbids the several states from *denying* an accused his right to a fair and impartial trial. It is averred, however, that there is a vast distinction between *denial*—affirmative action by the state—and *failure to enjoy*, which does not invalidate the judgment (Dorsey v. Gill, supra; Burkett v. Mayo, supra; Hudspeth v. McDonald, supra; Miller v. Hudspeth, supra, and Farrell v. Lanagan, supra). It is averred that the said allegation is irrelevant, immaterial and not open to inquiry in this proceeding.

15. Admitted.

16. Denied. It is averred, however, that had relator's counsel seasonably presented, as it was their duty to do,

the petition to the officials at the Western State Penitentiary, Rockview, it would have been promptly presented to the relator for his execution and just as promptly returned to his counsel.

NEW MATTER.

Further answering the relator's petition, the respondent alleges the following new material.

17. On April 4, 1951, the Supreme Court of Pennsylvania, denied the relator's Petition for a Writ of Habeas Corpus, predicated on substantially the same grounds alleged in this proceeding, a true and correct copy of the Opinion of said Court being attached hereto, made a part hereof and marked "Exhibit A".

WHEREFORE, the respondent prays your Honorable Court to discharge the rule to show cause and dismiss the Petition for a Writ of Habeas Corpus. And he will ever pray, etc.

/s/ ROBERT E. WOODSIDE,
Attorney General of Pennsylvania.

By /s/ RANDOLPH C. RYDER,
Deputy Attorney General of Pennsylvania.

Answer of John W. Claudy, Warden of Western State Penitentiary, to Petition for Writ of Habeas Corpus

Commonwealth of Pennsylvania }
County of Dauphin } ss.

Before me, a Notary Public in and for said State and County, personally appeared RANDOLPH C. RYDER, Deputy Attorney General of Pennsylvania, who being duly sworn according to law, deposes and says that the foregoing facts are true and correct to the best of his knowledge, information and belief.

/s/ RANDOLPH C. RYDER,
Deputy Attorney General
of Pennsylvania.

Sworn and subscribed to before me this 16th day of April, 1951.

/s/ LUCILLE A. STROUP,
Notary Public.

My Commission Expires:

III.

TRANSCRIPT OF HEARING UPON PETITION.

(1)

TESTIMONY.

Before:

HONORABLE ALBERT L. WATSON
and HONORABLE JOHN W. MURPHY,
United States District Judges.

Scranton, Pa., March 11, 12, 13, 16, 17, 18, 19, 20, 1954.

APPEARANCES:

For the Relator:

CHARLES J. MARGIOTTI, Esq.
Pittsburgh, Pa.;
J. DRESS PANNELL, Esq.
Harrisburg, Pa.

For the Respondents:

RANDOLPH RYDER, Esq.
Assistant Attorney General
Harrisburg, Pa.;
FRANK P. LAWLEY, Esq.
Deputy Attorney General
Harrisburg, Pa.;

DONALD W. VANARTSDALEN, Esq.
District Attorney
Doylestown, Pa.;
J. JULIUS LEVY, Esq.,
United States Attorney
Scranton, Pa.

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(3) BY JUDGE MURPHY: Gentlemen, as we understand it, there is first the problem of a motion by the Commonwealth.

BY MR. RYDER: Yes sir. In answer to the Court's statement, the Commonwealth presented a motion to discharge the rule to show cause.

May I suggest at this time that the Court inquire whether or not the Relator, David Darcy, is in the courtroom. He was ordered produced.

BY JUDGE MURPHY: Let me make the observation that the Relator, David Darcy, is in the courtroom, that he is sitting in the rear of his counsel, Charles J. Margiotti and J. Dress Pannel and the other gentleman ——

BY MR. MARGIOTTI: He is an investigator, Judge.

BY JUDGE MURPHY: Now let me make one other inquiry: As we understand it, gentlemen, there are two problems: One, there has been a Petition for a Writ of Habeas Corpus. That matter was before the Court on a previous occasion. It was later before the Court of Appeals. The Court of Appeals has sent down a Mandate and we have before us the Mandate of the Court of Appeals, and in the normal course of events the first order of business would be to proceed to carry

out the Mandate and to inquire whether or not a Writ of Habeas Corpus should be granted. But in the meantime the State of Pennsylvania has announced and presented to the Court that they would like to move to discharge the rule to show cause. So that it is the judgment of the Court that (4) we should first dispose of the motion before we proceed to the carrying out of the Mandate.

Do the counsel for the Relator have any objection to that procedure?

BY MR. MARGIOTTI: We have an objection to a consideration at this time, Your Honor, for the reason that the first intimation I had that this motion was going to be presented came in the form of a letter from Mr. Ryder—the letter is dated, I believe, March 4, 1954—and which letter was received in my office either on March 5 or 6. There is no stamp from my office indicating when it was received. But the letter itself is dated March 4, and the letter states:

"I am enclosing herewith copy of Motion to Discharge Rule to Show Cause which will be presented to the Court, on Thursday, March 11, 1954, at 10:00 A.M."

And there was a copy of their motion:

"I am sorry that I am unable to serve a copy of our brief upon you at this time, but hope to have the same in your possession by Monday. Since the Motion is predicated largely upon points presented in the Court of Appeals in Elliott v. Baldi, which was argued on December 22, 1953, I am enclosing a copy of that brief."

And, as I understand that case was argued before the Circuit Court in Philadelphia by Mr. Ryder, and they sent me a copy of that brief, not a copy of a brief in this case but a copy of a brief they used in this Elliott case.

"However, I want to emphasize that our brief in the (5) District Court will not only be a rearrangement of the material

there presented, but also include additional material."

Now I hurriedly looked over this brief, the motion, and I didn't know what points were going to be stressed. I wasn't furnished with a brief by counsel for the Commonwealth. Yesterday at noon when I called my office from Hershey they told me there was a brief there from Mr. Ryder. So last evening I saw Mr. Ryder at the Casey Hotel and told him, "I was told there was some sort of motion as to a matter of law I heard you sent to the office." He said, "That is a copy of our brief. You haven't had that?" I said "No, it reached the office today." Last night about 10:00 o'clock or thereabouts I was served with a copy of a brief containing a number of pages——

BY JUDGE MURPHY: Seventy-five.

BY MR. MARGIOTTI: Very frankly I didn't have time to read it at that time because I was preparing the testimony to be produced before this Court.

BY JUDGE MURPHY: Was there a substantial question raised—let me change the wording. Was the question that is now before the Court in the motion to dismiss discussed at all in the Petition for Certiorari of the Commonwealth from the decision of the Court of Appeals?

BY MR. MARGIOTTI: (6) In my opinion, there was an adjudication of the very matter.

BY JUDGE MURPHY: So that counsel for the Relator was familiar with the matter as it was presented in the Petition for Certiorari.

BY MR. MARGIOTTI: Generally so.

BY JUDGE MURPHY: You say it has already been determined?

BY MR. MARGIOTTI: I think there was an adjudication because in the Petition for Certiorari—I have a copy here, Your Honor—they cited 117 cases ——

BY JUDGE MURPHY: Now, which position do you take? Do you say you are not familiar with it or that it is already adjudicated?

BY MR. MARGIOTTI: I take both.

BY JUDGE MURPHY: Then you object to proceeding at this time with the motion.

BY MR. MARGIOTTI: On the ground they can't proceed on this basis: Your Honor came all the way to Harrisburg, I understand, and Judge Pannell was there, for the purpose of determining when everybody was going to be ready to hear this case. At that time Mr. Ryder said he was ready at any time and he didn't give any indication he was going to present such a motion. I don't know when the Court first found out he was going to present such a motion ——

(7) BY JUDGE MURPHY: At any rate, you object to the consideration of the motion of this time.

BY MR. MARGIOTTI: I do.

BY JUDGE MURPHY: The objection is overruled. Proceed with the motion.

BY MR. RYDER: First of all, I am extremely regretful

that we were unable to place this brief in the hands of the Court until yesterday or in the hands of my learned adversary until last night.

Mr. Margiotti now knows how I felt nearly three years ago—just shy a few days—when I was forced to appear in this Court and answer a rule to show cause why a writ of habeas corpus should not issue. That rule, as Your Honor will recall, was served on me only less than twenty-four hours before its return hour here in this Court.

I do not, however, wish to take advantage of my learned adversary.

This is an important case. We raise what we contend to be most important issues, and we feel that they are basic, fundamental, they are jurisdictional, and we would like to have this Court give them its thorough consideration.

This matter, Your Honor, is a serious national problem. Some of the issues which have been raised in this motion were presented in the Circuit Court of Appeals in Elliott v. Baldi, argued before the full bench of the Court of Appeals on December 22, 1953, now awaiting decision by that Court, in which the Attorneys General to date of forty states of the (8) Nation have joined with Pennsylvania.

This is not a local problem; it is nation-wide. For that reason we have felt that we should raise these issues here in this Court so that we could have the advantage of this Court's views.

Now, first of all, here I think probably I ought to state this Court is not precluded from considering the issues which we have raised here. They were not raised in the Court of Appeals, most of them.

The Commonwealth in the presentation of the case in the Court of Appeals relied upon two very obvious legal points upon which we felt the case ought to be decided, namely, one, the denial of the Certiorari by the Supreme Court of the United

States should be given conclusive and controlling effect; two, that there was adequate evidence in the record of the prior proceeding which would support the conclusions and findings of this Court.

At the time of the reargument before the Court of Appeals the question of the conclusiveness of the denial of Certiorari had not been decided by the Supreme Court of the United States in the cases involving Brown, Rosenberg and Daniels, all of which, I believe, had been argued before the Supreme Court of the United States and were reargued the latter part of September. This case was set down for reargument the first part of December. Brown was decided sometime in February. This case was decided by the Circuit Court of Appeals on March 24, 1953.

In the application for Certiorari to the Supreme Court of the United States we did raise one point in that application, and that is Point No. 1 in this motion, and that is, in effect, that this is a suit against the State of Pennsylvania to which the State of Pennsylvania has not consented and is enjoined (9) by the Eleventh Amendment to the Constitution. True, the Supreme Court of the United States denied Certiorari, but I don't think that denial should be construed adversely to the Commonwealth ——

BY JUDGE MURPHY: Let me ask you one thing. The language of the Eleventh Amendment doesn't cover your situation, does it?

BY MR. RYDER: I think it does.

BY JUDGE MURPHY: Let me read it to you.

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State or Subjects of any Foreign State."

Is there anything in the Amendment that says that a citizen of one state cannot sue his own state?

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: Not in the wording.

BY MR. RYDER: Not in the wording.

BY JUDGE MURPHY: You don't discuss that question in your brief.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: Whereabouts?
You go ahead.

(10) BY MR. RYDER: The very point which Your Honor raised was decided in the Supreme Court in the case of Hans v. Louisiana, 134 U. S. 1, and in the case of North Carolina v. Temple, 134 U. S. 22.

BY JUDGE MURPHY: They are in your brief?

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: Page 13?

BY MR. RYDER: Page 13, the opening paragraph.

BY JUDGE MURPHY: I see. "... by a resident thereof."

BY MR. RYDER: Yes.
With respect to the effect of the Certiorari and Certiorari application, I said I didn't think that had any legal significance,

so far as Point No. 1 was concerned, for these two reasons: First of all, we were attempting to induce the Supreme Court to review a judgment which was not final. We knew that. We thought there was a question of jurisdiction involved and probably we could terminate the litigation at that point. We took the chance and were not successful. Second, it was not raised in the Court of Appeals; it was not raised in the District Court. Therefore, the Supreme Court of the United States refused to review for that reason.

Now turning to Point No. 1—I am going to split my argument on Point No. 1—I have already stated the proposition, I will try to be very brief on it. I have already pointed out (11) the Eleventh Amendment comprehends actions by a resident of a state against a particular state. Now it comprehends not only suits brought against a state by name, but those also against its officers, agents, and representatives, though not named as such, where the state, though not named as such, is nevertheless the real party in interest.

Now the obvious purpose of this proceeding is a substantial reversal of a criminal judgment. That was stated by Mr. Justice Marshall, as I recall, in Ex Parte Watkins. It is a direct attack upon the validity of the criminal judgment forming the basis of detention. That judgment was secured in a proceeding by and in the name of the State of Pennsylvania and against the particular defendant—the said judgment which the applicant is seeking to reverse in this Court.

True, the applicant is in the custody of the Warden of the State Penitentiary at Rockview—and may I call to Your Honor's attention the fact at this time that the name of the institution at which the applicant is now confined, and which he has been confined, has been changed by legislation of the Commonwealth of Pennsylvania from Western State Penitentiary to the State Penitentiary at Rockview, and the acting Warden of the State Penitentiary at Rockview, or the Warden

rather, is no longer the man specified in the application, Dr. John W. Claudy, but Dr. Fred S. Baldi.

The Warden of the institution has no interest in this judgment. He has no liability to anybody for the detention pursuant to the judgment. And if an order is obtained from this Court that is the objective of this proceeding—discharge, that order can only apply upon the custodian by reason of his (12) official representation of the State. It, therefore, can't be claimed that it is a suit against the custodian. But it is, in sum and substance, against the State.

Now, this is the pay-off—taking the application itself, it is predicated on the Fourteenth Amendment. The Fourteenth Amendment does not run against individual action; it runs against State action.

Now then, if it isn't a suit against the State within the provisions of the Eleventh Amendment, then certainly he has not made out a case under the Fourteenth Amendment.

Now then, the next question is this: Is the suit "in law or equity" within the Eleventh Amendment? The simple answer to that is if it is not a suit "in law or equity" within the Eleventh Amendment, then this Court does not have the judicial power to entertain this application because the sole source of its constitutional power, which authorizes or empowers this Court to entertain all cases "in law and equity," is a clause in the Judiciary Article of the Constitution which provides: "The judicial power shall extend to all cases in law and equity, arising under this Constitution . . ."

Now if it is a case "in law and equity" under the Judiciary Article, certainly it is a case "in law and equity" under the Eleventh Amendment.

Now then, has the State of Pennsylvania consented to this suit? The Supreme Court of the United States has said that the consent may only come from the State itself, that it can not come from the Constitution or laws of the United States.

There is not a statute in Pennsylvania which can be or may be interpreted as authorizing our consent to suit in (13) any Federal Court exercising jurisdiction in Pennsylvania. There is no statute in Pennsylvania which would authorize the Attorney General of the State to consent to such a suit, and his common law powers, as established by the Supreme Court of Pennsylvania, I believe, in a litigation in which my learned adversary himself was counsel, do not comprehend such authority.

So I say to you that this case is clearly a suit against the Commonwealth of Pennsylvania to which it has not consented and which is comprehended by the Eleventh Amendment.

Now that takes me to the next point which I have raised in our brief, namely, if this is not construed as a suit against the State of Pennsylvania, then, by necessity, it must be construed as an exercise of appellate revisory power. In other words, it is a suit against the individual warden of the institution. The objective is the reversal of the judgment pursuant to which he is being held. And, by necessity, this Court is being asked to exercise a revisory jurisdiction.

The writ of habeas corpus has been characterized in several of the opinions of the Supreme Court as the exercise of revisory jurisdiction or an appellate jurisdiction.

As part of the prior processes which the applicant is required to exhaust before he can seek his relief under the Statute, Sections 2241, 2254, Revised Judicial Code, he must go to the Supreme Court of the United States on Certiorari.

Now we are mindful of the pronouncements of the United States Supreme Court in Brown and other cases that denial of Certiorari means absolutely nothing on the merits. We are very mindful of them because we were there in the Supreme Court of the United States at the time those cases were argued (14) and we argued to the contrary.

I am submitting to you, gentlemen, that there is a vast dis-

tinction between determination on the merits and determination on other grounds. And it is only on reflection and view of the arguments which I heard made before the Supreme Court of the United States, which I myself made in Smith v. Baldi, the exchange of colloquy between counsel and members of the bench, that it finally dawned upon me the significance of that phraseology "has no legal significance on the merits."

As a condition precedent to getting into the Supreme Court of the United States according to their rules, Rules 12 and 38, it is necessary for the applicant to state a case involving a "federal question of substance." That is one of the vital essentials. If he does not lay that down, the Court does not have jurisdiction, and they are not going to examine the record necessarily to see whether or not that question does exist unless he sets it forth plainly.

Rules 12, 38(5)—the only natural inference from that is, as I read and study the two rules—is that when the Supreme Court denies Certiorari it can mean one of three possible things. No. 1, that it does not appear upon the face of the record that a substantial federal question is involved. Now that matter is jurisdictional in every United States Court—in every United States Court. It has got to appear upon the face of the record, otherwise this Court does not have jurisdiction. No. 2, possibly that application does not comply with the Rules of Court, some technical requirement.

I can't conceive that the Congress of the United States would require an applicant for relief in the Federal Court to go down to the Supreme Court of the United States on Certiorari (15) from denial of relief by the State court and yet simply merely require that there be merely pretense, just going through the motions, without complying with the Rules of Court.

Now then, if the denial is predicated on that ground, they have not exhausted their State remedies because that application has been construed by the Supreme Court in Darr v. Bur-

ford and Brown v. Allen as being an essential part of the exhaustion of state remedies, and that is a jurisdictional bar. That was decided in Darr. If that is not done, this Court does not have jurisdiction ——

BY JUDGE MURPHY: That case said, in effect, you come up and allege a certain thing in compliance with the Rule and in order to have us entertain it you have to have the number of Justices' favor as a requisite. It used to be four. Is it four now?

BY MR. RYDER: Yes.

BY JUDGE MURPHY: Unless you get four you don't get it. The denial of Certiorari means no more than that.

BY MR. RYDER: I think it does ——

BY JUDGE MURPHY: Isn't that what you have said?

BY MR. RYDER: I am coming to that point. I have a few things I want to bring to this Court's attention with respect to that ——

BY JUDGE MURPHY: I would say no matter how you put it—three thought you (16) had substantial—it may mean that three of the Justices, certainly after a perusal of the papers and a study of them, may have felt there was considerable merit ——

BY MR. RYDER: That is right.

BY JUDGE MURPHY: —— but if you can't get one more, back you go.

BY MR. RYDER: That is right.

BY JUDGE MURPHY: All right, go ahead.

BY MR. RYDER: Now since Your Honor has raised that point, I can't conceive, especially in a capital case—and I believe I made this observation to the Supreme Court of the United States—I can't conceive—we find it most difficult to conceive—as a matter of fact, it is almost incredible—in the face of the language which was expressed or used by the Supreme Court of the United States to the effect that in a capital case they give the most serious consideration to every question of fact and law, and since there are decisions with the opinion—and they are referring to denial of Certiorari—that it must be predicated upon some legal ground.

Now Mr. Justice Frankfurter ——

BY JUDGE MURPHY: If there are nine members of the Supreme Court—and according to the Halliburton letters at least—the Certiorari papers are distributed to each member of the Court, that is Petition for Certiorari, and if it is distributed to all nine and they read them and study them, as we feel they do—quite (17) certain they do—then if there is not a granting of the Write of Certiorari, is it equivalent to a finding, in effect, that six out of nine feel there is no merit or not sufficient merit to get into that Court?

BY MR. RYDER: I wouldn't say yes to that statement. I would like to say so ——

BY JUDGE MURPHY: It may not mean an affirmative finding, but it means six of them refused to make an affirmative finding by placing approval on granting of the Writ for various reasons, however. It may be one of a half-dozen, apart from the merits.

BY MR. RYDER: Apart from the merits.

I was going to say I would like to agree with Your Honor's statement it was an implied finding on the merits ——

BY JUDGE MURPHY: It may be. It could be one of four or five things.

BY MR. RYDER: Faced with a definite rule of law it is not a ruling on the merits. I am suggesting it may be a ruling, in effect, that the application didn't set forth a substantial federal question—jurisdictional. Possibly they didn't comply with the Rules of Court. Now that is a part of the exhaustion of State remedies. If they didn't, I don't see how they can possibly come into Court and say they have exhausted their State remedies. I don't believe Congress would require them to go down to the Supreme Court just to go through the motions (18) of sending a paper down there, regardless of whether or not it complied with the Rules, it could hold there was exhaustion of State remedies. I can't conceive it.

There is one other part that I can't conceive and that is that one was not "ripe" for a determination of the particular matters in the Petition, assuming they complied with the Rules of Court and it did present a substantial federal question.

When an application is made back to this Court on the basis of that record, that is the record upon which the Court has got to act upon the rule.

Footnote 19, Brown v. Allen, it is the record in the prior proceedings in the State court before coming to this Court upon which this Court must act.

Now then, when that record comes into this Court, aren't they asking you to do one of three things; and each one of those three things—if you did anyone of those three things, you are really exercising revisory jurisdiction over the Supreme Court of the United States.

First, they have got to aver on the face of the record or application in order for this Court to have jurisdiction there is a substantial federal question involved. You have the implied finding, possible implied finding—rendered on the denial of the Certiorari, or the result of the denial of Certiorari, by the Supreme Court of the United States that that record does not present a substantial federal question. If that is true, then this Court does not have jurisdiction. (19) And if you go ahead and entertain the application in the face of that, aren't you then exercising a revisory jurisdiction over the Supreme Court?

Second, suppose the denial is predicated upon the proposition that it did not comply with the Rules of Court. Now before they can get into this Court they have got to exhaust their State remedies, and resort to that Court is part of it. If you entertain the application on the ground they have exhausted their State remedies, and let's assume the Supreme Court did predicate denial on that ground, aren't you exercising a revisory jurisdiction over the Supreme Court of the United States?

Third, assuming the other two points were answered in the affirmative, jurisdiction, compliance with the Rules of Court, but they decided that the time is not "ripe." Now if you entertain this application and proceed to adjudicate on the ground the time is ripe, aren't you exercising a revisory jurisdiction over the Supreme Court?

Now the Judiciary Article of the Constitution comprehends there shall be one Supreme Court. There is no doubt about that. There shall be one Supreme Court. It has no superior. That Court has no superior in the Federal judicial hierarchy. That is the paramount tribunal of the Nation.

Now we are aware of the fact that the Supreme Court has said—and I have pointed that out in my brief, incidentally—we are aware of the fact the Supreme Court has said hotwith-

standing that Court has denied Certiorari or refusal of relief by State courts or even after affirmance, the Federal District Courts may under the Writ of Habeas Corpus inquire, nevertheless, (20) into the criminal judgment. I am aware of that fact. I have admitted it in my brief. But I submit for the consideration of Your Honors that what you are, in effect, doing by entertaining this application is to exercise a revisory jurisdiction over the Supreme Court.

Now then, if the Supreme Court says that is all right; that is all right with us. But what we are objecting to—and I say this most respectfully and I trust Your Honors will realize it is rather difficult for me to make this argument to this Court, and at the inception I want to state that the Commonwealth of Pennsylvania, Department of Justice, Attorney-General's office, has the highest regard for our Federal Judicial System. I made that statement before the Judges from all over the United States, and I will reassert it here. We do. It is not the judicial system, necessarily. It is not the judges. It is the system which has been established by the application of this power to issue Writs of Habeas Corpus to State prisoners that we are attacking.

Now, as I have said before, the Constitution provides for one Supreme Court. There was a definite reason for that. As I recall: Alexander Hamilton writing in The Federalist —Mr. Chief Justice Marshall in Cohens v. Virginia: The reason for that was this: It was necessary to have one Supreme Court tribunal which would consistently and uniformly expound the laws of the Constitution of the United States. Mr. Hamilton writing in The Federalist put it in a little bit different vain. He said the purpose of it was to eliminate a "hydra in government from which nothing but contradiction and confusion can proceed if the state courts of the thirteen original states were left to themselves to determine what the Constitution (21) mant."

Now let me just analyze, if I may, the situation that we have to confront with now. In Pennsylvania the law provides for fifteen Federal District Judges. We have a seven judge Court of Appeals. Now if a single Federal District Court Judge has the power under his authority to issue a Writ of Habeas Corpus on the application of a State prisoner, we have, in effect, in Pennsylvania—and I say this most respectfully—fifteen appellate revisory courts exercising the jurisdiction over our highest State court.

Now, on the next level in the Court of Appeals—and this is incredible, and I believe the Court of Appeals found it incredible in the course of my argument in Elliott v. Baldi—out of a seven judge membership who sit in three judge panels, it is possible to have thirty-five different three judge combinations.

Now on a National level, Your Honor, I believe that we have 218 Federal District Judges, and using the possible combinations within those, not overlapping within those, we would have 131 three judge appellate revisory courts exercising jurisdiction over the 218 appellate revisory courts, that is single judge appellate revisory courts. That is a total of 349 appellate revisory courts in the United States exercising jurisdiction over the forty-eight state courts. And the purpose of the creation of the Supreme Court was to eliminate thirteen added hydras. Instead of thirteen added hydras, we now have, if this system is constitutionally authorized—we have 349 added hydras.

Now, what does that mean in Pennsylvania alone in the administration of our criminal justice? It means this, as I analyze it, when a problem involving a right secured by the (22) Federal Constitution arises during the course of a trial in the State court, what rule of law is that State court going to adopt in disposing of that application? Is it going to use the rule which has been laid down by the District Court, the Fed-

eral District Judge, in the area of the trial? Is it going to use the rule which has been laid down by the District Court, the Federal District Judge, in the area of confinement? Suppose it has been decided in one area one way. Suppose it has not been decided in the other. Which rule is it going to follow?

Now then, assuming it has not been decided in Pennsylvania at all. Where is it going for its law? Is it going down to the Southern District of Louisiana, the Northern District of Oregon, the Eastern District of Massachusetts? Suppose there is a conflict. Which one is it going to accept? And suppose it accepts one that is not acceptable in the District where it subsequently comes up on Habeas Corpus.

Now then, we have this additional problem, there might be a split. There frequently is a split in the three Judges of the Court of Appeals. There was here in this very case. If we had been before a three judge division composed of men voting in our favor, we would have won this case and we wouldn't be here; or if we had in the second three of whom were composed of men voting in our favor, we wouldn't be here. It is possible to have conflicts, as I have illustrated, between panels in the same circuit. Who is going to resolve those, and where are we going for our choice of law? We don't know.

(23) Now then, with respect to the Constitution itself, we take the position that the Constitution—the Framers of the Constitution comprehended there should be one Supreme Court exercising revisory jurisdiction over the State courts.

For several years after the adoption of the Constitution there was very strong contention between the State of Virginia and the Federal Government, and other states, that the power of the Supreme Court did not extend to revisory jurisdiction over the civil judgment of the State courts. That was finally decided in Martin v. Hunter in 1807, as I recall, and it wasn't until Cohens, some ten years later, it was decided by the Supreme Court they had power to review a state criminal judgment.

Now that case has been cited for that proposition. The Cohens case has been cited for that proposition here. If Your Honors read it, I cannot conceive—and I have read it—you will see it is really not a criminal proceeding but a quasi-criminal proceeding for the recovery of a penalty. But, nevertheless, Cohens v. Virginia has been cited for that particular proposition that is in the law.

BY JUDGE MURPHY: Let me make one suggestion. You are probably going to take some time. You quoted from Hamilton in No. 80. Are you familiar with Hamilton in No. 82, this paragraph:

"But could an appeal be made to lie from the State courts to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations (24) countenance the affirmative: The plan of the convention, in the first place, authorizes the national legislature 'to constitute tribunals inferior to the Supreme Court.' It declares, in the next place, that 'the Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall ordain and establish'; and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of that of the subordinate courts . . . ?"

BY MR. RYDER: I am acquainted with that proposition. I didn't set it forth in my brief. It slipped my mind.

I was just coming to this point: I want to call Your Honors' attention—I point it out in my brief—I realize that there is dicta against this position I am asserting. For instance, Mr. Justice Story in Martin v. Hunter—you will find that I have pointed that out on Pages 40 and 41 of the brief—said that

appellate federal jurisdictional power can be divided by Congress any way they want to divide it except it couldn't take away Supreme Court original jurisdiction.

Mr. Justice Frankfurter in Brown v. Allen—I feel this was in answer to the complicated argument I made in Smith v. Baldi—said virtually the same thing, and I have pointed that out in my brief.

We have the highest regard for both of those gentlemen, but I am wondering whether or not—I am calling it to your (25) attention whether or not they really gave due and proper consideration before they pronounced those statements to the actual formation of the Constitution itself.

If you turn to Pages 41 and 42 of our brief—I have pointed out when the document was in the Committee of Style there was a provision in there which would have prescribed just that, empower Congress to divide up the jurisdictional power of the United States any way it saw fit. But when the main draft came out of the Committee of Detail—I believe it was the Committee of Detail; maybe I have got them inverted—anyway, when that came out that clause was deleted. Only one inference you can draw from that—incidentally, Mr. Hamilton was a member of the final Committee. That Committee was composed of Messrs. Johnson, Hamilton, Morris, Madison, and King, I have pointed that out on Page 42. So the only inference you can draw from that elimination is that Congress or the Framers didn't intend to authorize Congress to divide up the jurisdictional power any way they saw fit. There was to be only one court. That was the Supreme Court.

There is further evidence of that intention, and that is the Judiciary Act of 1789. That Act was drafted by Oliver Ellsworth, who later became Chief Justice of the Supreme Court.

If you will refer to the concluding paragraph of that brief, you will find that statement made by Mr. Ellsworth.

That great Act was penned by Mr. Ellsworth, a member of

the convention which framed the Constitution, and one of the early chief justices of the Supreme Court. It may be said to reflect the views of the founders of the Republic as to the proper relations between the Federal and State courts.

(26) Now then, there was no provision made in the Act of 1789 for any Federal court to exercise any revisory jurisdiction over a State court except the Supreme Court. True, there was power of removal from State courts to Federal courts, but they were exercising an original jurisdiction there, not a revisory jurisdiction.

Now, as a practical matter, I have already pointed out the practical ramifications of the exercise of this jurisdiction. Probably—I know the Court in passing upon the constitutionality of any act shall not concern itself with degrees of propriety. But we say, based on pronouncements not only of statements of the Supreme Court, which I have set forth in my brief in Darcy, but statements made by the Court of Appeals for the Third Circuit, that this type of revisory jurisdiction is highly improper.

We think it is also demonstrated by the observation made by Mr. Justice Jackson in the concurring opinion in Brown v. Allen where he set forth the resolutions adopted by the Conference of Chief Justices of the State Appellate Courts in which they also expressed their concern with the propriety of it.

Now we don't believe that Congress ever intended to confer this type of jurisdiction upon the single Federal Court. I went back to the debates involving the Act of 1867, the predecessor of our present Revised Judicial Code, and there is not one word of evidence in those debates that Congress ever intended to confer that jurisdiction. And I have made reference to certain contemporaneous statements. As a matter of fact, I believe Mr. Justice Jackson in the concurring opinion (27) in Brown v. Allen pointed that out also. I believe that is in my brief, sir. And I have also pointed out arguments and articles by con-

temporary writers of that time that Congress never intended to invest Federal courts with such revisory jurisdiction. But the Supreme Court has said, in effect, it did, and we have got to take it that way. I say if it did, Congress has exceeded its power conferred by the Constitution. That is the proposition ——

BY JUDGE MURPHY: Has it occurred to you that if your argument is sound and has merit to it sufficient to the point, that it would be necessary in order for this Court to declare it unconstitutional to have a three judge Court because of the requisite of a three judge Court where the constitutionality of an act of Congress is attacked? Did you consider that?

BY MR. RYDER: That only applies to State acts, doesn't it?

BY JUDGE MURPHY: There is a statute, as I recall it, that says that where the question is going to be raised as to the constitutionality of a Federal statute that the Attorney General is to be notified and afforded an opportunity to be present.

BY MR. RYDER: We have already done it.

BY JUDGE MURPHY: There is a case after that that says even though the Attorney General was not notified it was all right to proceed, and in order to set aside certain orders of a commission or certain state questions you have to have a three judge Court.

(28) Your impression, I take it, is that does not apply where it is a Federal act itself.

BY MR. RYDER: It isn't my interpretation.

BY JUDGE MURPHY: You agree we do not have to have a three judge Court where it is a Federal act.

BY MR. RYDER: Yes sir, that is my interpretation.

With respect to the Attorney General, I notified the Clerk. I presume he notified the Attorney General. He was likewise notified in the Elliott case. He was directed by the Court of Appeals to file a brief. That is with respect to the constitutionality of the Act of Congress. And that time expired February 22, and to the best of my knowledge, he has not filed a brief. I do not know whether he intends to do so or not.

Now then, that brings me down to the last point. Assuming that this is not a suit against the State, one; assuming that the jurisdiction which this Court is being asked to exercise in this application is not in violation of any of the constitutional provisions, which I have set forth; assuming that the statute is constitutional, still I say that this Court does not have jurisdiction, and again this argument is predicated on matters which were not presented to the Court of Appeals. Now the reason —my reasons for this are these: As a condition precedent to coming into this Court the applicant has got to establish he has exhausted State remedies. That has got to appear on the face of the record. It should appear on the face of the application. He ought to make an allegation to that effect. But you can (29) examine this application in vain, and you will not see any allegation of that effect. He was given the right by the Court of Appeals to amend his application, but he hasn't yet done it, and even if he would do it, it wouldn't entitle him to the relief that he is seeking here.

This very issue upon which this Court has been directed to make an inquiry, that is the alleged community hysteria which operated to deprive the applicant from receiving a fair and impartial trial as guaranteed by the "due process" clause of the Fourteenth Amendment, could have been presented to the

Pennsylvania courts in numerous ways. It could have been presented by an application to the Trial Court for a change of venue or for a continuance. Or it could have been made at the trial by a motion for the withdrawal of a juror. Or it could have been made post-trial on application for a new trial. Three ways in the Trial Court. The matter could have been raised in the matter being presented to the Supreme Court of Pennsylvania on direct appeal and to the Supreme Court of the United States on Certiorari. Now to that I add one other remedy. It isn't very often resorted to, but he had a remedy. If he made an application for change of venue and he was unsuccessful, he could have made the same application to the Supreme Court. The Supreme Court has the power to issue a Writ of Certiorari to the Trial Court and take that indictment out of that court and send it to another county for trial. It has done it. As a matter of fact, they did it in a case my learned adversary was Counsel, Commonwealth v. Riley.

It is not contended in the application that he exhausted those remedies. It is not contended in the application that (30) they were inadequate. He has never contended anywhere—in this Court, the Court of Appeals, any place—he exhausted those available remedies ——

BY JUDGE MURPHY: Am I right in saying he could have raised it before trial by a motion for a continuance or change of venue; he could have raised it at the trial by a motion for withdrawal of a juror; he could have raised it after the trial on on appeal before the State Supreme Court ——

BY MR. RYDER: He could have raised it on an application for a new trial to the Trial Court.

BY JUDGE MURPHY: He could have raised it on an application for a new trial to the Trial Court; then before the

State Supreme Court or the United States Supreme Court on the way up. Now then, he didn't do that. Now then, it comes along here or goes before the Supreme Court of Pennsylvania and he asks for a Writ of Certiorari. The Trial Court have a right to reargument nunc pro tunc. Isn't that what he did?

BY MR. RYDER: He did that; yes sir.

BY JUDGE MURPHY: Now then, do you have here a copy of that Petition or is there anywhere a copy of the Petition to see exactly what he raised at that time?

BY MR. RYDER: I don't think I have that here. I came up here with a whole volume of records in a suitcase, but I don't think that is in there.

(31) BY JUDGE MURPHY: In your brief at Page 9 you say:

". . . that it was then, for the first time, mentioned to the Supreme Court of Pennsylvania in an application for certiorari and reargument . . ."

I wonder if it was raised then. As I recall it, there was something raised in the application for certiorari and reargument. Then the matter came before this Court and, as I understood it—I may be wrong—there were things raised before this Court that had not been raised before the Supreme Court, and we gave counsel an opportunity to go before the Supreme Court in a Petition for a Writ of Habeas Corpus in order to raise the very issues that were raised here.

BY MR. RIDER: Yes sir.

BY JUDGE MURPHY: And if you say at Page 9 that it was raised then for the first time, it may be you are not stating a fact.

BY MR. RYDER: That well might be. I am apologizing.

BY JUDGE MURPHY: I think it is important myself that it be right.

BY MR. RIDER: Certainly.

BY JUDGE MURPHY: And I would like to see a copy of the Petition that was presented for Writ of Certiorari and Reargument, and then a copy of the Petition that was presented after they had been before this Court and then went to the Supreme Court, the (32) Petition for Writ of Habeas Corpus.

Not now. Just make a note of it. I would like to have it.

BY MR. RIDER: I have a copy of the Petition for Writ of Certiorari—not Writ of Certiorari but Habeas Corpus in the Supreme Court.

BY JUDGE MURPHY: Now then, as I understood it, to develop it further, whether it was raised in the Petition for Certiorari, and Reargument or whether it was raised in the Petition for Writ of Habeas Corpus, as I understood it, you say that it could have been raised in all these other ways.

BY MR. RIDER: Yes sir.

BY JUDGE MURPHY: But in assuming that it was raised then—you say that it was raised or it was not raised then—which?

BY MR. RIDER: I would have to concede, Your Honor, that it was raised there.

BY JUDGE MURPHY: All right.

BY MR. RIDER: The point I am going to make is it was not decided —

BY JUDGE MURPHY: That is what I am coming to. That is my next question. Assuming that it was raised in either one of those two Petitions, and, as I understand it, when they were before us the question of what occurred in the way of the sentence of the week before (23) and what occurred by way of remarks of the sentence on the Saturday apparently of the verdict on June 12; that is the little fellow from Philadelphia on some other case; and what was apparently alleged to have been done by Judge Boyer were all before us. And if they were before the Supreme Court of Pennsylvania, as we said, for them to pass on them, then, as I understand it, if they were raised, then the Supreme Court in their Opinion, the Per Curiam Opinion, referred to Judge Boyer; they don't spell it out; they say certain things and they refer to certain things in connection with the jury. I am not sure they mention anything about the newspaper publicity. But they did make a finding that there was not sufficient in the Petition of the Relator to warrant granting a Writ of Habeas Corpus. And, as I understand it, Judge Maris said that if they did make that judgment they in fact have made a finding that there was not sufficient merit in the Petition presented to them to warrant granting the Writ.

Do you say they didn't do that?

BY MR. RYDER: I don't think as I analyse the Opinion of the Supreme Court of Pennsylvania refusing the application for a Writ of Habeas Corpus, they did expressly or by implication, as I analyse the Opinion, pass upon this issue of community hysteria which might have operated — according to the allegation — or which did operate here — to deprive the applicant of a fair and impartial trial. And I can't understand

why they wouldn't do it because if they would do it, it would be tantamount to converting the Petition for a Writ of Habeas Corpus into a delayed motion for a new trial. In Pennsylvania it isn't available to review errors. It is not a substitute for an (34) appeal. It is not a substitute for a motion for a new trial ——

BY JUDGE MURPHY: Now let me see if I can state your argument so it will be clear to me. You say in the Opinion at 367 Pa. 130 that the Supreme Court did in a Per Curiam Opinion deny the Writ. They say at Page 133: "We find the present petition for a writ of habeas corpus to be wholly without merit . . ." And then they go on and they discuss certain things in connection with the alleged misconduct or incompetency, or whatever term you desire to use, in regard to the counsel for the defendant, and then about the interviews with the jurors. And then they say: "We do not deem it necessary to comment upon the criticism of Judge Calvin S. Boyer beyond stating that there is nothing whatever to indicate that any statements or actions on his part were prejudicial to relator's having a fair and impartial trial . . ."

Now then, there is no mention of the question of hysteria and prejudice, and your argument is then that—we would take it, what you argue is that the Supreme Court in its judgment felt that that was a matter properly to be raised on appeal and not to be raised in a collateral proceeding in a Petition for Writ of Habeas Corpus.

BY MR. RYDER: Yes sir; that is precisely my position.

BY JUDGE WATSON: According to the Petition presented to the Supreme Court, was there any mention made of hysteria such as brought before us at this time?

BY MR. RYDER: (35) In answer to that question I would say yes. I believe the applications in the Supreme Court and this Court were almost identical.

But I can understand why the Supreme Court of Pennsylvania wouldn't pass upon it in the application for a Writ of Habeas Corpus because it would be converting it into a motion for a new trial and would have been making it into a delayed motion for a new trial.

BY JUDGE WATSON: That is your view as expressed a few moments ago.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: Let me say this: On Page 5 of the Petition for Writ of Habeas Corpus presented to this Court the following appears:

"That the hysteria and prejudice, which swept the town, as the result of the Zietz and Foster trial and verdict, was so general as to influence beyond a slight degree those jurors included in the panel from whom the jurors who actually tried the relator upon the charge of murder were selected."

So that it was raised here and after being here they went before the Supreme Court of Pennsylvania. But what was in that Petition actually, we will find out or learn upon an examination.

All right.

(36) BY MR. RYDER: So naturally the refusal of the application by the Supreme Court of Pennsylvania was not an expression of opinion on the merits. There was not an adjudication of that issue at all.

Now I am frank to admit ——

BY JUDGE MURPHY: If the Supreme Court of Pennsylvania, in effect, had it before it and if the Supreme Court felt this is something that should be raised on appeal and can not be raised on habeas corpus but did not say so, hasn't the matter been adjudicated in the sense they say it is functus officio, it is a dead issue?

BY MR. RYDER: I was about to say it the matter had been adjudicated by the Supreme Court of Pennsylvania in the application for a Writ of Habeas Corpus that we would be in exactly the same position we were in in Smith v. Baldi.

Now the only reason Smith was able to get into the Federal courts in that case is because the Supreme Court of Pennsylvania did in the application for a Writ of Habeas Corpus pass upon the issue there involved, although I think—and I thought then—I still think it should have been raised in the direct appellate court proceeding, but they gave him the benefit of the doubt ——

BY JUDGE MURPHY: That was the Opinion of Judge Goodrich where he covered the question of sanity and the like.

BY MR. RYDER: Yes sir. You read the Opinion in Smith v. Baldi and Daniels v. Allen. They make a distinction between Smith v. (37) Baldi and Daniels v. Allen on the ground the Supreme Court of Pennsylvania treated the application for a Writ of Habeas Corpus in that case as a substitute for an application for a new trial. But here they did not. They have called a halt to it ——.

BY JUDGE MURPHY: You say Allen says they did use it as a substitute?

BY MR. RYDER: Daniels v. Allen, a section of the Opinion.

BY JUDGE MURPHY: What did it say?

BY MR. RYDER: Daniels v. Allen said made the distinction between that case and Smith v. Baldi on the ground the Supreme Court of Pennsylvania had allowed it as a substitute for an appeal.

Now then, my position, in short, is he did not exhaust his remedies in the Pennsylvania courts and, therefore, under the ruling of the Supreme Court in Daniels v. Allen this Court does not have jurisdiction. That is the very first question you have got to determine ——

BY JUDGE MURPHY: Do you mean he didn't "exhaust" or "exercise"?

BY MR. RYDER: Both.

BY JUDGE MURPHY: If he didn't exercise, did he exhaust? If you could raise it in six ways and you didn't, you get to the end of the road, haven't you exhausted it?

BY MR. RYDER: You probably have exhausted it; but not in the sense (38) the word "exhaust" is used in Section 2554 ——

BY JUDGE MURPHY: What do you say they could do as of this moment that they haven't done?

BY MR. RYDER: What ——

BY JUDGE MURPHY: The Relator — in order to exhaust his State remedies what can he do?

BY MR. RYDER: Absolutely nothing. He is foreclosed from raising the question of community hysteria, and properly

so, because if he isn't, there will never be any end of any litigation. I think that is amply demonstrated by this case. Of course, if he didn't exhaust his state remedies he couldn't get into the United States Supreme Court because there was a substantial Federal question involved.

I am mindful of the fact the majority of the Court of Appeals said he did exhaust state remedies. Judge Biggs, I think, wrote that Opinion ——

BY JUDGE WATSON: Judge Biggs wasn't in the majority.

BY MR. RYDER: He was on this point.

BY JUDGE WATSON: Where is he in the majority?

BY MR. RYDER: He wrote the majority Opinion.

BY JUDGE WATSON: (39) I thought Judge Maris did.

BY JUDGE MURPHY: No. Neither did. All they could agree on was a Per Curiam.

BY JUDGE WATSON: The Per Curiam was really based upon Judge Maris' Opinion, was it not?

BY JUDGE MURPHY: No. A very nice question. As I understand it: Judge Biggs wrote one Opinion; Judge Maris wrote one Opinion; Judges Kalodner and Hastie wrote one Opinion; and the Court wrote a Per Curiam.

BY MR. RYDER: Anyhow, I am assuming he made the statement, but I am taking the position there isn't one bit of evidence in the record

BY JUDGE MURPHY: But if you will recall: Judges Kalodner and Hastie agreed with Judge Biggs overall, but disagreed—let's see.

"Kalodner and Hastie, Circuit Judges, join in the views expressed in this opinion insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at Darcy's trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial."

Now then, they then after that—they did follow Chief Judge Biggs' Opinion—then on Page 428 they say, Judges Kalodner and Hastie:

"We agree with all that is said and decided in the per curiam opinion of the court.

(40) "We also agree with Judge Marjs' analysis of the very limited reach of due process of law when invoked to remedy shortcomings of the defense made by counsel of choice in a criminal case. The district court rightly disposed of this issue."

Now then, if you go to the Per Curiam Opinion, and that is listed first in 203 F. 2d 407 at 409, they say:

"The majority of the court is of the opinion that the relator must be afforded the opportunity to prove the allegations set out in his petition for habeas corpus insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at his trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, since the undisputed and incontrovertible facts as shown by the record do not countervail the allegations of hysteria and prejudice . . ."

Now then, the next paragraph:

"The court has considered the allegations of the petition concerning the conduct of Darcy's counsel . . ."

The next paragraph:

"All members of the court are of the opinion that the affidavits of members of the jury must be stricken from the relator's petition."

Next paragraph:

"The respective views of the members of the court are set out in the opinions which follow this per curiam opinion."

Next paragraph:

(41) "The judgment of the court below will be reversed with the direction to enter an order staying Darcy's execution until the disposition by the court below of the instant case on remand on the issue of alleged hysteria and prejudice. The court below will be directed to strike from the petition for habeas corpus the jurors' letters attached thereto. The stay order entered by this court will be vacated."

Now then, Chief Judge Biggs' Opinion ——

BY MR. RYDER: The point that I ——

BY JUDGE MURPHY: —— is joined only by Judge McLaughlin, so that can't be the majority Opinion.

BY MR. MARGIOTTI: That is correct.

BY MR. RYDER: I was assuming that Judges Hastie and Kalodner had joined with Judge Biggs ——

BY JUDGE MURPHY: They joined the other only on hysteria and prejudice including Judge Boyer's asserted visits.

BY MR. RYDER: The part of Judge Biggs' Opinion directed to the point I was just making appears on Pages 410, 411—203 F. 2d ——

BY JUDGE MURPHY: You have the wrong citation in your brief. You have 204. You might just as well correct it. You have 204 instead of 203.

(42) While I am at it—that is on Page 4 of your brief—then

on Page 6 of your brief in your statement you have ". . . The judgment and sentence were affirmed, opinion reported at 364 Pa. 294 . . ." That is only one-half of it. There is another, 364 Pa. 288. There was Zietz and Foster, one by Justice Horace Stern and one by Justice Allen Stearne.

BY MR. RYDER: Now the point that I was making covered by the statement of Judge Biggs, that is with respect to exhaustion of State remedies, is he said:

". . . The Supreme Court of Pennsylvania denied the second petition for habeas corpus filed to it, sub nom. Commonwealth ex rel. Darcy v. Claudy . . ." giving the citation—". . . passing on every substantial ground alleged in the petition."

BY JUDGE MURPHY: But only one other Judge joined in that Opinion.

BY MR. RYDER: He gave the applicant the benefit of the doubt, and I am glad Your Honor pointed that out to me. I assumed Judges Hastie and Kalodner joined with Judges Biggs and McLaughlin in this phase of the case. But that makes my position even stronger. I felt I had to get over that very fact.

I was going to make the point there isn't one bit of evidence in this record from which the Court could make that determination.

If there was a void in the Opinion of the Supreme Court it was the applicant's duty when he took that case into the Supreme Court of the United States, or even when he came into this Court—it was the applicant's duty, if he could, to have (43) that void corrected by way of amendment. But I venture to say he couldn't have corrected that void by way of amendment.

I have given the explanation why the Supreme Court of

Pennsylvania have refused to pass upon that point in that application.

Now then, if the Supreme Court of Pennsylvania didn't pass upon that point, under Daniels v. Allen this Court does not have any jurisdiction ——

BY JUDGE MURPHY: I take it, the only way we could find out is send to the Supreme Court of Pennsylvania and say "Did you refuse to pass on it because it could be properly raised on appeal, or did you fail to pass on it?"

BY MR. RYDER: It isn't this Court's duty to do it.

BY JUDGE MURPHY: We want the answer—if nobody has the answer.

BY MR. RYDER: It is the applicant's duty to state that in his application.

BY JUDGE MURPHY: You say the applicant must allege he has exhausted and prove it.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: All possible attempts you say have been exhausted.

BY MR. RYDER: Yes sir. It is his duty to put that in his application. If he fails to put that in his application, then this Court has no jurisdiction. It has no right to even entertain it (44) any further. That is on the jurisdictional point with regard to State remedies.

I take this further position with respect to jurisdiction in this Court, and that is that it doesn't appear on the face of the

record — on the face of the application that he is being detained in custody in violation of the Constitution of the United States.

Now Section 2241 of the Code, which confers upon this Court the power to issue writs of habeas corpus, says: "The writ of habeas corpus shall not extend to a prison ——"

Section 2241 of the Code, which confers the jurisdiction upon this Court to issue writs of habeas corpus, says that "The writ of habeas corpus shall not extend to a prisoner unless . . . He is in custody in violation of the Constitution . . ." "Unless," "shall not." That means when he comes into this Court he has got to establish prima facie that he is being detained in custody in violation of the Constitution.

Now it has been said by the Supreme Court in Frank v. Mangum, 237 U. S. 309, one of the leading cases on this phase of litigation, that a man is not in custody in violation of the Federal Constitution if the State has provided an adequate corrective judicial process whereby the basic matters upon which that unconstitutional detention is based may be judicially probed. Now that is the effect of it.

I will finish very shortly ——

BY JUDGE MURPHY: There was a question of taking a ten-minute recess. You take all the time you want. If you want another hour, you take it.

Let's see—we will take a ten-minute recess. You have (45) been going, and the Stenographer has been going all the time.

(Recess.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

BY MR. RYDER: Just before the beginning of the recess

I was calling to the Court's attention the decision of the Supreme Court in Frank v. Mangum, 237 U. S. 309. The substance of that decision, which has never been overruled or modified, was that the judgment—criminal judgment is not constitutionally void if the State provides a corrective judicial process. Now that is the sum and substance of that decision. In short, that it is only voidable and if it is only voidable, then the writ of habeas corpus doesn't lie because it has been asserted again and again that the writ of habeas corpus is available only where the judgment is an absolute nullity—void.

Now then, here is the process, Your Honors, by which we come to the conclusion that he has no standing here in this Court on this application: Under Section 2254 he is required to exhaust his State corrective judicial processes before he can come in here. Now then, when he comes back here and says that he has exhausted his State corrective judicial processes he, by necessity, has to admit that a corrective judicial process is available. Therefore, the judgment is not constitutionally void but only voidable. Then you apply the rule in 237 U. S. 309, Frank v. Mangum.

Now I want to refer, Your Honors, if I may, to a recent decision of the Court of Appeals, Ninth Circuit, Palakiko v. Harper, 209 F.2d 75 ——

BY JUDGE MURPHY: Is that in your brief?

(46) BY MR. RYDER: No sir. It just came to my attention following the preparation of the brief.

And I refer you to Pages 80 and 81 ——

BY JUDGE MURPHY: Is it lengthy—the quote you are talking about?

BY MR. RYDER: No, it isn't.

BY JUDGE MURPHY: We would like to hear it read.

BY MR. RYDER: These remarks, Your Honors, are directed to Section 2255, the provision with respect to a delayed motion for a new trial which lays down the same result as Section 2254. Section 2254 applies to State prisoners; Section 2255 applies to Federal prisoners. He says here that "The rule thus stated . . ."—he is talking about U. S. v. Rosenberg, which I have cited in this case, and I take this case to emphasize to this Court that if this decision by the Court of Appeals for the Third Circuit is correct, it is absolutely in conflict with U. S. v. Rosenberg. I am speaking with respect to this phase of the inquiry.

He says:

"In United States v. Rosenberg . . ."—giving the citation, ". . . the court, speaking of the remedy under Section 2255, Title 28, and comparing it to the writ of habeas corpus, said: 'It, like that writ, cannot ordinarily be used in lieu of appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights.'

(47) "The rule thus stated finds its support in numerous cases some of which are there cited . . . It would appear that if the fact that the accused has not taken the appeal which was available to him prevents a collateral attack upon a conviction by petition for writ of habeas corpus, or under Section 2255, a similar result must obtain, where, as here, the appeal was actually taken and the issue decided adversely to the appellant . . ."

That is exactly the same situation that the applicant finds himself in here when he comes into this Court and says "I have exhausted my State remedies." He is, in effect, saying that it is—the judgment is only voidable, and not having been successful in securing a reversal of that judgment in the State court or down in the Supreme Court of the United States, we

must assume it is no longer voidable, and even if it were voidable, this Court wouldn't have the power to entertain the Writ here unless it is absolutely void, and he can't say it is absolutely void.

I have set down certain points and principles controlling the disposition of this application. I say if this Court entertains the application and goes into a hearing on the merits of the case, it will be a violation of the several principles which I have set down here. First, Point No. 1 is, by necessity, the purport to impeach the veracity of this record itself. That can't be done. That was decided by the Supreme Court in the case of Riddle v. Dyche, 265—as I recall—U. S.

Now you have got to bear in mind the record before this Court consists of the record in all the prior proceedings. The Supreme Court says that in Brown v. Allen, Footnote 19. In those (48) prior proceedings you have got the voir dire examination of the jurors. In those prior proceedings you have got the post-verdict statements of the jurors. I know that the Court of Appeals struck those statements from this record but, nevertheless, they were part of the record before the Supreme Court of the United States. I believe that this Court has got the power to consider those notwithstanding the fact they were stricken from the record. Those post-verdict statements themselves negative the very contention ——

BY JUDGE WATSON: You say we should consider at this time and on this motion—consider those affidavits made by the jurors?

BY MR. RYDER: I am saying, Your Honor, that they can be considered for this purpose, that he proposes by this proceeding to impeach those statements which he himself put into the record ——.

BY JUDGE MURPHY: What you are saying is that the Supreme Court of Pennsylvania has condemned having them there and the Third Circuit Court has condemned having them there and ordered them stricken, and notwithstanding the fact they have been ordered stricken, since they were included in the Petition for Certiorari to the United States Supreme Court they may be considered by this Court insofar as their contents throw light on the question of whether or not there was hysteria and prejudice so far as it affected the jury.

BY MR. RYDER: Yes sir. Not only that but you may consider them for the purpose which I have suggested is an attempt to impeach the record, which he can't do. He is not only attempting to (49) impeach that portion of the record but he is attempting to impeach the voir dire examination of the jurors, and, on top of that, we have expressions of opinion by the Trial Judge that the applicant received a fair and impartial trial and the verdict was amply warranted ——

BY JUDGE MURPHY: Nevertheless, we have a Mandate, the lower Court ——

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: —— which must be respected and followed.

BY MR. RYDER: Well, I am pointing these things out to the Court because they were not pointed out to the Court of Appeals in the course of my argument. We feel we have a duty to this Court, as well as to society, to point those things out to this Court. Therefore, in the discharge of my duty I am doing that today.

There is one thing more, and I am going to close on this

point. This Court, in effect, is being asked and it is, in effect, being directed by the Court of Appeals to conduct a hearing for the purpose obviously of making findings of fact which would be inconsistent with the implied findings of fact of the Pennsylvania Supreme Court. Assuming now—assuming now that the Supreme Court of Pennsylvania passed upon this phase of the case in the application for Writ of Habeas Corpus—if it didn't, he has no right here—if it did, this Court is being asked to do something which it can't do under the Seventh Amendment of the Constitution.

The only thing that this Court can do is take that (50) record as it has been made in the past and examine it for errors of Federal Constitutional Law. It can't take that record and make findings of fact either in conflict with the expressed or implied findings of fact of the State courts. This point was not argued to the Court of Appeals, and if it had been argued to the Court of Appeals, I believe we would not be here. We have given this question important consideration. We can't believe the Court of Appeals would have directed this Court to do that. And even if it did, we think that this Court still has a duty to observe that provision of the Constitution ——

BY JUDGE MURPHY: What you are, in effect, saying is you are raising a point they wouldn't give you a rehearing to raise.

BY MR. RYDER: No. ——

BY JUDGE MURPHY: You didn't raise it in the rehearing.

BY MR. RYDER: No, I didn't raise that point.

BY JUDGE MURPHY: There is one point you didn't

cover that is covered on the last page of your brief, Page 74. As I understand it, you argue that even if the Court were to deny the motion to dismiss and go into the hearing on the Petition for Writ of Habeas Corpus and then came to the conclusion that some relief should be afforded, that the Court does not have the right, power or jurisdiction to order the discharge of the prisoner but at most it could grant a new trial. Isn't that what you (51) argue? That is what your brief says.

BY MR. RYDER: If it grants a new trial you are exercising revisory jurisdiction, yes sir. Under the Seventh Amendment that is the most it can do. If the Court doesn't feel it can grant a new trial, that is a point in our favor with respect to the Commonwealth's argument ——

BY JUDGE MURPHY: Isn't that what you argue?

BY MR. RYDER: I will concede your proposition—you don't have the power ——

BY JUDGE MURPHY: ". . . If the decision be erroneous in that respect, it may be reversed and a new trial had. Provision for such revision was made in the twenty-fifth section of the Judiciary Act of 1789, and is retained in the Revised Statutes . . ."

As I understand it, the most the Court could do would be to grant a new trial and that the Court has no right to grant a new trial by any statute or right conferred upon it.

BY MR. RYDER: That is right. As a matter of fact, I don't think it could grant a new trial on the indictment. I think ——

BY JUDGE WATSON: How can we grant a new trial?

BY MR. RYDER: I don't know.

BY JUDGE WATSON: Whoever said we might?

(52) BY JUDGE MURPHY. The Supreme Court.

BY JUDGE WATSON: The Supreme Court ——

BY JUDGE MURPHY: Yes.

BY MR. RYDER: That is the very point I have been making ——

BY JUDGE MURPHY: When I say the Supreme Court, there is a case Virginia v. Rives, 100 U. S. 313 at 338.

BY MR. RYDER: In closing let me just read, if I might, one statement by Mr. Justice Jackson in the laying of the cornerstone of the Research Center of the American Bar Foundation in Chicago on November 2, 1953, which appears on Page 19 of 40 American Bar Association Journal.

"Paradoxical as it may seem, in this age of general education our nation is plagued with unprecedented juvenile delinquency, gangsterism and shocking crimes followed only by long-delayed punishment or by none. The administration of our criminal law, from one cause or another, is a humiliation and a discredit to our profession and our country . . ."

On behalf of the Attorney General of Pennsylvania we thank this Court for its indulgence. We ask this Court—as I know it will—to appreciate the gravity of the issues which we have raised, the ramifications not only in Pennsylvania but nation-wide. We as agents of the people of Pennsylvania ask you as agents of the people of Pennsylvania and the nation to (52a) do everything within your power and to help us out of this most

unwholesome, undesirable dilemma in which we find ourselves involved.

BY JUDGE MURPHY: You refer to a footnote to Volume 10, American Bar Journal, a speech before the American Bar Association on the coverage of the Act of 1867. I believe they have that in the place in Harrisburg where they have the law books, the State Library.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: Will you ask them to send it up so that I can take a look at it—so that the Court can take a look at it?

BY MR. RYDER: I shall be delighted to do it.

BY JUDGE MURPHY: I do think they have it across the street, but I don't think they go back that far.

BY MR. MARGIOTTI: When I said to the Court that I opposed the argument on this motion of Mr. Ryder I did so because last evening in going over the Petition I observed that he had cited approximately—oh, I think about ninety different citations. I don't know whether they are cumulative in effect or not ——

BY JUDGE MURPHY: The ninety are all cumulative historically—decisions of which you, the General, are quite familiar.

BY MR. MARGIOTTI: No.

(53) BY JUDGE MURPHY: With all the experience you had you are not familiar with them?

BY MR. MARGIOTTI: I am not familiar with all the cases cited at random any more than a person picks out a digest and hands it to me to look it over. That is the position I find myself in.

I am satisfied with the Court's ruling; I do not object to it.

There were ninety-three additional citations and, in addition to that, so far as the first Petition for Writ of Certiorari was concerned, he had cited 117 cases, and of the 117 cases 89 are cited in this Petition. So he has 89 and the new ones. Of course, I had no way of checking on the new ones. I know something about the others. I did not have a thought or recollection of having made any special study of them because it was a long time ago and I couldn't do it overnight, and I don't think anybody expected me to do it. But I am satisfied Your Honor has properly handled the matter, and I am not objecting to the fact it is being heard. I would like to withdraw my objection.

When I said this was res adjudicata, I didn't mean that the Petition for Writ of Certiorari made this question res adjudicata. What I meant was that the decision of the Third Court of Appeals is res adjudicata because it is a decision—an application to reargue, and in that application to reargue I think practically every case cited is contained now in this new brief that has been presented to your Honorable Court ——

BY JUDGE MURPHY: On the phase that Mr. Ryder talks about there are questions (54) by Judge Biggs joined in by Judge McLaughlin and not mentioned by the other five.

BY MR. MARGIOTTI: As to what?

BY JUDGE MURPHY: As to whether or not the Pennsylvania Supreme Court ——

BY MR. MARGIOTTI: Oh yes. It was mentioned by several, Judge Biggs ——

BY JUDGE MURPHY: "The Supreme Court of Pennsylvania denied the second petition for habeas corpus filed to it, sub nom. Commonwealth v. Claudy, 367 Pa. 130, 79 A. 2d 785, passing on every substantial ground alleged in the petition."

BY MR. MARGIOTTI: Here's what I find on Page 20 of the printed Opinion: Judge Biggs said:

". . . In the light of all the circumstances it must be concluded that the court below desired to afford Darcy a full and fair opportunity to exhaust his State remedy and that the decision of the court below should not be affirmed on the ground that when the final order on April 11, 1951 was entered Darcy had not then exhausted his State remedy as he has done now. Justice requires the case be treated as one in which Darcy has exhausted his State remedy as of April 11, 1951 . . ."

BY JUDGE MURPHY: But Judge Maris said at that time you asked us to grant a stay and the reason we didn't grant a stay was we felt you had an opportunity to go before the United States Supreme Court and to get it, and we had found there was no substantial ground and (55) shouldn't grant it, but Judge Maris said notwithstanding that we failed to give it, or refused to give it, that he as a member of the Court of Appeals would grant the stay, and that the Supreme Court in October did deny the Certiorari, and that is when Judge Biggs wrote the opinion that the remedies had been exhausted and Judge Maris said they should be treated as having been exhausted.

BY MR. MARGIOTTI: That is right. The Relator pre-

sented such a Petition on April 9, 1951 which set forth all the grounds for relief asserted in the Petition previously filed in the District Court and now before us. This Petition was denied by the Supreme Court of Pennsylvania on April 10, 1951, and then we had the case go to the Supreme Court. Of course, that was in order to comply with the case—the Burford case, which has just recently been handed down by the Supreme Court of the United States. You were required to make an application at least for a petition on appeal from the Supreme Court.

What we did in the Supreme Court—as I recall it, when the Petition was first presented—I think it was presented to Judge Follmer who was in Philadelphia or near there; then we came before you. At one time I thought I would present a petition and did present a petition to the Supreme Court asking the Supreme Court to permit us to reargue the case nunc pro tunc, but they refused that petition and—do you have a copy of that here?

BY MR. RYDER: Yes.

BY MR. MARGIOTTI: May I see it?

(56) I don't want to make any statement about what is in that petition because I haven't seen that for a long, long time, and I don't remember what is in the petition.

But, at any rate, when we went before Judge Follmer, as I recall it, that petition had been refused and we came here. Your Honor very kindly agreed that it would withhold its decision on the matter until it was presented—until our Petition for a Writ of Habeas Corpus was presented to the Supreme Court of Pennsylvania, and we presented a Petition for a Writ of Habeas Corpus to the Supreme Court, and it was after that Your Honor rendered your Opinion. But at that time we had not exhausted our remedies because we had not filed with the United States Supreme Court because we hadn't had the time

a Petition for a Writ of Certiorari, and we did file that later and it was refused, and the Circuit Court of Appeals in Philadelphia held that at the time they wrote their Opinion that the State remedies had been exhausted.

Now they said—both Judge Maris and, I think, Chief Judge Biggs, said that we had presented in our petition to the Supreme Court—and I have been trying to get a copy of the petition and I have sent for my papers at the office, but we haven't been able to find it. I am going to try to locate it sometime between now and the afternoon session ——

BY JUDGE MURPHY: May I say to you that we have been furnished with a copy of the Petition For Certiorari To The Court Of Oyer & Terminer Of Bucks County And For Reargument Nunc Pro Tunc, as well as a copy of the Petition For Writ Of Habeas Corpus And Rule To Show Cause which was the second petition presented to the Supreme Court of Pennsylvania on —— Do you have a request?

BY MR. MARGIOTTI: Your Honor, may I ask one question since you have looked (57) at it?

BY JUDGE MURPHY: Just one minute, please!
—— which would apparently be the Petition for Writ of Habeas Corpus of April 9, 1951.

BY MR. MARGIOTTI: That is while our Petition was pending before you.

BY JUDGE MURPHY: That is right.

BY MR. MARGIOTTI: In that Petition did we raise the question of hysteria?

BY JUDGE MURPHY: I don't know. It is lengthy and I will examine it over the recess. It is about fifteen pages.

BY MR. MARGIOTTI: All right.

Then I would prefer before going on with the argument to come to a conclusion on that one question because it will make some difference whether we did mention it or whether we didn't. And I would like to examine that Petition. I can do it very readily here, Your Honor.

Your Honor, may I call your attention to Page 3 of the Petition to the Supreme Court of Pennsylvania, being Paragraph 16, which reads:

"That the Relator did not have a fair and impartial trial as is contemplated and guaranteed by the Constitution, for the reason among others:

"That the atmosphere of the trial was such that the Petitioner could not have had a fair and impartial trial. The Relator was placed on trial at Doylestown on Monday, June 7, 1948, three days following the end of the trial (58) before the Honorable Calvin S. Boyer, of the co-defendants, Harry Zeitz and Harold Foster, who were found guilty on the preceding Friday, June 4, 1948, of murder in the first degree and the penalty fixed at death. After the trial of the Relator, the fourth defendant, Felix Capone, who had pled guilty, was sentenced by the Court to life imprisonment. The District Attorney, at the Pardon Board hearings in the Zeitz and Foster cases, declared that they were the 'leaders' and that Zeitz was the one who actually fired the shot which killed William Kelly.

"That upon the conviction by the jury of Zeitz and Foster, Judge Calvin S. Boyer, who presided at said trial, openly and publicly praised the jury for their verdict. On June 5, 1948, the 'Doylestown Daily Intelligencer' carried on its first page an article which stated that . . ."

I think the Court is familiar with that.

". . . A copy of said newspaper article is hereto attached, made part hereof, and marked Exhibit 'A.'

"That the hysteria and prejudice, which swept the town and county, as the result of the Zeitz and Foster trial and verdicts, was so general as to influence beyond a slight degree, those jurors included in the panel from whom the jurors who actually tried the Relator upon the charge of murder were selected.

"That on account of the hysteria which swept the town caused by the Zeitz-Foster trial, defendant's trial should have been postponed in the interest of justice (59) until a later date when he could be tried in an atmosphere of judicial calmness unaffected by the trial of his co-defendants. However, neither the Trial Judge, the District Attorney nor defense counsel took care of this vital matter, and on Monday, June 7, 1948, he was forced to go to trial before Judge Hiram H. Keller and a jury. The jurors were drawn from a second panel which had been summoned, the majority of whom were familiar with what had transpired during the prior week at the Zeitz-Foster trial and the Relator's connection therewith, including the Judge's utterances, and the public and newspaper comments thereon . . ."

Then there is some more reference to what the Judge did ——

BY JUDGE MURPHY: As I understand it, it all boils down to the answer yes.

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: It was raised before the Supreme Court.

BY MR. MARGIOTTI: It was raised and we had exhausted our remedy.

BY JUDGE MURPHY: Now then, my copy of that Peti-

tion—that just left here. I have the Petition for Habeas Corpus but the Certiorari paper—yes sir.

BY MR. MARGIOTTI: As I said to Your Honor, I say that this matter has been adjudicated by the decision of the Third Circuit, and that decision of the Third Circuit you have an Opinion of the Court, (60) a Per Curiam Opinion ——

BY JUDGE MURPHY: And that the Per Curiam on which the Court agreed does not mention it. It is mentioned in Chief Judge Biggs' Opinion, but it is agreed to only by Judge McLaughlin. That is only a minority of seven.

BY MR. MARGIOTTI: Here's the way I have analyzed these decisions—if you will bear with me a moment, please.

Judge Biggs wrote an Opinion in which he resolved both questions in our favor, and the two serious questions were, one, of prejudice in the community at the time of the trial, and the other, of improper and inadequate representation ——

BY JUDGE WATSON: You say he resolved it in your favor. Are you right about that?

BY MR. MARGIOTTI: I mean in his Opinion.

BY JUDGE MURPHY: Judge Biggs resolved it in the General's favor—in favor of Darcy.

BY MR. MARGIOTTI: Correct.

BY JUDGE MURPHY: Judge McLaughlin joined.

BY MR. MARGIOTTI: Correct.

BY JUDGE MURPHY: Judges Hastie, Kalodner, Maris, Goodrich, and Staley refused to go along on that part of it.

BY MR. MARGIOTTI: (61) But Judge Kalodner and Judge Hastie did go along with part of Judge Biggs' Opinion, and that part has to do only with the question of prejudice. Therefore, we have four Judges out of seven on the question of prejudice ——

BY JUDGE MURPHY: That is two to five on one and four to three on the other.

BY MR. MARGIOTTI: That is right.

And so I take the position on these questions that the Circuit Court by this decision has adjudicated the questions raised here by my friend Mr. Ryder ——

BY JUDGE MURPHY: The only trouble with it is that it is not in the Kalodner and Hastie joiner; it is not in the Maris-Goodrich-Staley Opinion; it is only in the Opinion of Judge Biggs joined in by Judge McLaughlin as to the particular finding about which Mr. Ryder talked.

However, there is before us a Mandate from a majority of the Court as to what we should do.

BY MR. MARGIOTTI: That is correct.

And in this Petition, Your Honor, before the Circuit Court for Reargument, as I said, Mr. Ryder cited certain cases. Each and every one of the cases cited—not as many as he cites in his brief now before your Honorable Court—over—at least I would say about 1/10—roughly about 1/10—that number—are all to be found in the list of cases cited in the present brief.

And then he goes before the Supreme Court in an effort to get a Writ of Certiorari ——

(62) BY JUDGE MURPHY: I am saying to you, General, any court—certainly the lower court—would be able to find as much light from a denial of a petition for reargument as it would from a denial of certiorari.

BY MR. MARGIOTTI: I think that is correct, except—that is correct, but so far as what is adjudicated, it is not what the Supreme Court has adjudicated. I don't claim that they adjudicate by refusing a writ of certiorari. I say what they do is they stand by the decision of the Circuit Court in that they don't allow the appeal and, therefore, the decision of the Circuit Court is final and res adjudicata.

BY JUDGE MURPHY: The other side say—as I understand it, what you say is the matter was raised for the first time in the Petition for Reargument before the Circuit Court; the Circuit Court denied reargument; the Supreme Court denied Certiorari. Do you say either of those is a new adjudication on that question?

BY MR. MARGIOTTI: As long as they fail in the Circuit Court of Appeals—they raise the question in the Circuit Court of Appeals, whether by reargument or by original argument—a petition for reargument, and a petition for reargument is denied, I would say it would be an adjudication.

Now with reference to the fact that the penitentiary has been changed to the State Penitentiary at Rockview—I think is the proper name, and the new warden is Fred S. Baldi, I admit that is correct, and I think heretofore—I don't know whether we did it by agreement or otherwise, but the papers filed (63) by Mr. Ryder in the Supreme Court ——

BY JUDGE MURPHY: Well, I take it, you move to amend.

BY MR. MARGIOTTI: —— carry the proper names, and it isn't proper to move to amend.

BY JUDGE MURPHY: You move to amend your Petition so that the name may be changed in compliance with the statutory change in 1953.

BY MR. MARGIOTTI: And that the successor ——

BY JUDGE MURPHY: To which the other side does not object—do you?

BY MR. RYDER: We have no objection to the amendment, Your Honor. It is absolutely immaterial. This case could have been very properly captioned "Ex Parte Darcy."

BY JUDGE MURPHY: That is what you say in your brief.

BY MR. RYDER: It helps emphasize the argument I have been making—it is a suit against the State.

BY MR. MARGIOTTI: We would also change the name of the Warden of the State Penitentiary at Rockview from John W. Claudy to Dr. Fred S. Baldi—is that correct?

BY MR. RYDER: No objection. That is correct.

BY JUDGE MURPHY: So that there is a motion to amend the name of the prison and the name of the warden, no objection, and it will be (64) allowed.

BY MR. MARGIOTTI: In fact I think we had agreed to

a change before because he prepared his papers that way in the Supreme Court.

BY JUDGE MURPHY: It is three minutes before the noon recess, and I would like to ask a few questions so that the matters may be contemplated over the noon recess.

I would like to know the date of the indictment; the date of the argument on the motion for a new trial, the date of the Opinion of the lower court; and the date of the judgment and sentence of the lower court. And I want to check whether or not it is true that, according to the record, the date of the crime was December 22, 1947, and the date of the trial June 7, 1948, and the date of the verdict June 14, 1948.

BY MR. MARGIOTTI: Your Honor, we have here photostatic copies of the Clerk's records that give all that information exactly, and it is quite authentic. We will introduce that when the time comes.

BY JUDGE MURPHY: It is now 12:30 and we will recess until 2:00 o'clock.

(Recess.)

(Court resumes at 2:05 P. M. with all parties, including the Relator, David Darcy, present in Court.)

BY MR. MARGIOTTI: If Your Honor please, I would like to make my argument as short as possible, and I would like to make this comment with reference to the questions that have been raised by Mr. Ryder. I think they are wholly legal questions and that they should have been raised in the

Court of Appeals and there argued, and I do not believe they can pick up an argument and raise it (65) piecemeal, one part before the Court of Appeals and another part before the District Court ——

BY JUDGE MURPHY: Except jurisdiction can be taken up at any time.

BY MR. MARGIOTTI: That is right. I agree with you on the question of jurisdiction, but I don't believe the question of jurisdiction is a serious one. I don't think it is as serious as contended.

These questions have come up time after time and time again not only in Pennsylvania but all over the country, and the Supreme Court of the United States has had cases of this kind, many of them, and most Circuit Courts have had them, and I don't know that the question of jurisdiction has ever been raised successfully in any case. So that I believe that the—Your Honor has a very good grasp of the law involved and particularly the position as taken by Mr. Ryder. I compliment the Court on how fast you got the information in that brief ——

BY JUDGE MURPHY: If you were up until 2:00 o'clock in the morning instead of resting over at the Casey, you would have had it too.

BY MR. MARGIOTTI: In the first place, I couldn't have read it. In the second place, I don't think I would have done it ——

BY JUDGE MURPHY: I want you to know I got those papers about 10:00 o'clock last night.

BY MR. MARGIOTTI: That is when we got them too, at the same time.

BY JUDGE MURPHY: All right.

(66) BY MR. MARGIOTTI: Mr. Ryder says to the Court ——

BY JUDGE MURPHY: I say that I got part of them. But the Commonwealth had omitted part of the brief. Mr. Smith got part and took it up, and I started about 11:00 last night.

Go ahead. That is neither here nor there.

BY MR. MARGIOTTI: Mr. Ryder says you ought to give this matter very serious consideration and help him out, as he put it, in the serious question, and the people and State of Pennsylvania want to be helped out.

Of course, it is a serious matter. There is no question about that. It is also a serious matter to this Petitioner because his constitutional rights have been violated. The Constitution is for the benefit of everybody, no matter who he may be, and it is just as bad to violate a person's constitutional rights as it is to do what the Deputy Attorney General is asking this Court to do.

We have a number of witnesses here, most of whom would like to get away as soon as possible. Some of them have some very pressing reasons for wanting to get away today, and for that reason I am going to terminate what I am about to say now and leave the matter to the Court.

BY MR. RYDER: By way of rebuttal, if the Court please, I have lived with this case for over three years. I have examined the records starting in Bucks County. If there was ever a man who received his constitutional rights in the trial

of any criminal case, this applicant did. The Trial Judge in his Opinion refusing application (67) for a new trial specifically said so in the last paragraph of his Opinion.

I am not asking this Court to help us out—and by "us," I mean the Commonwealth of Pennsylvania—but I am asking this Court to approach this problem in the light of the law and the Constitution of the United States.

As a matter of fact, Section 2243 of the Revised Judicial Code, the last paragraph, says the application shall be disposed of "as law and justice require."

Now, I take it, that the Constitution is a constituent part of the law. I don't think there will be any disagreement on that.

I have pointed out in our brief over the space of 74—75 pages—if I may say so, this brief represents the crystallization of several years effort in industry on the part of our staff—not only of our staff but the staffs of other states.

He has not made out a case within the Constitution. First of all—I think I can quite clearly demonstrate that. There are two points I want to make—I will make them very brief—which I neglected to make this morning. This is on the constitutional phase. First of all, his application in this Court must, by necessity, be predicated upon the fact—upon the ground that the Supreme Court of Pennsylvania in its adjudication on the application for writ of habeas corpus made a mistake by an error of judgment.

An error of judgment is not a denial of due process of law. The Supreme Court of the United States has said that in many cases, and I have those cases cited in my brief.

(68) But let's look to the record, as this Court must look to the record. When the case was here before, what did the Supreme Court of Pennsylvania have before it? Not absolutely affirmative evidence—but moot facts, which are more persuasive than affirmative evidence could ever be.

The Supreme Court of Pennsylvania in its Opinion refusing

the writ of habeas corpus characterized the trial attorney as a very highly reputable attorney, a man of forty years—I understand, trial experience. He was represented in the Supreme Court of Pennsylvania in the direct appeal and in another habeas corpus application, not filed by my learned adversary, by two others, highly able and skilled lawyers, as so stated by the Supreme Court of Pennsylvania in its Opinion.

Now that trial counsel didn't take any of the three steps, which I outlined in my argument this morning, which he might have taken.

The Supreme Court of the United States in the case of Stroble v. California—cited in my brief—343 U. S. 181, speaking through Mr. Justice Clark, pointed out during the course of its Opinion where practically the same point was being made as is being made in this application, that the failure of experienced trial counsel to make an application for a change of venue was a most significant factor in their determination of that issue. In the Court of Appeals for the Second Circuit in the case of United States v. Rosenberg, which I mentioned this morning during the course of my argument, there was also a re-emphasis of that factor.

If I might indulge for just a moment, I would like to read from the Court of Appeals, Second Circuit, United States v. Rosenberg.

(69) ". . . From November to February 21, 1951, there were no news items whatever concerning the pending prosecution. When a defendant believes that pretrial publicity has been such as to render impossible the selection of an impartial jury, there are well-organized methods of raising this issue before the trial commences. He may move for a change of venue or for a continuance until the public clamor shall have subsided. The petitioners took neither of these courses . . ."

Neither did the applicant in this case take either of these courses, although they were available.

". . . On the voir dire the prospective jurors were carefully questioned as to whether they had read or heard about the case and a jury was selected satisfactory to the defendants . . ."

Now that occurred in this case.

". . . who did not even use all the peremptory challenges permitted them . . ."

Now that occurred in this case as the Court pointed out in the course of its Opinion.

". . . Nor do they allege that any trial juror was in fact prejudiced by the publicity now asserted to have made a fair trial impossible. Their present position is obviously an afterthought, inspired by the hope of securing a new trial after having exhausted all hope of reversing the verdict by appeal and petitions for certiorari . . ."

Now we have exactly the same thing here word for word, practically fact for fact ——

BY JUDGE MURPHY: (70) There is one difference.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: We have the majority of the Court saying—Judges Hastie and Kalodner suggested following the suggestion of Mr. Justice Jackson, that perhaps is a way out, and they recommend it for the future in this District —in this Circuit that where there are allegations in the petition, the Court might direct the petitioner to amend his petition so as to amplify and contain everything he wants to put before the Court. That could have been done in this case except we are confronted with a Mandate. The majority of the Court has said—that majority would be Judges McLaughlin, Biggs, Hastie, and Kalodner—apparently if it was just a question of what was in the petition—what happened on Friday before Judge Boyer and then the jury itself, and then

what happened before Judge Boyer as to the sentencing of the boy from Philadelphia on the following Saturday, and then, in addition to that, the Judge Boyer incidents—Judge Goodrich and Judge Staley and Judge Maris said that even granting all the things that are there in the petition, in view of what is in the trial record and comparing those, there was not sufficient ground to allow a hearing. But Judges Biggs, McLaughlin, Kalodner, and Hastie say that apparently they never had an opportunity along the line from the time they first raised the question in the petition before the Supreme Court of Pennsylvania to prove the truth of what they say or to amplify it by other evidence, and that they should be afforded that opportunity, and the Mandate comes down and says afford to them that opportunity. That is where we are at.

BY MR. RYDER: (71) Well, our objection is predicated upon grounds which have not been presented before any tribunal in the nation ——.

BY JUDGE MURPHY: You argue as a matter of law what has occurred in this country over the last ten years is in violation of the law, and you say you and the other thirty-nine Attorneys General are trying to bring about a solution, and in order to protect yourself, you have raised it more completely in this case than you did in the Elliott case and it is squarely before this Court for decision.

BY MR. RYDER: Yes sir.

We realize the limitation imposed on this Court as a result of the Mandate ——.

BY JUDGE MURPHY: Except jurisdiction is always a question.

BY MR. RYDER: Yes.

These issues were not presented to the Court of Appeals. Therefore, we felt they are open and not only may be considered but should be considered by this Court before it even goes into a hearing.

BY JUDGE MURPHY: All right.

All right, we say that it is the judgment of this Court on the questions presented on the motion to discharge the rule to show cause that—when I say "judgment," I mean it is the opinion of the Court that our ruling thereon should be reserved. We will take it under advisement and in the meantime we will proceed to obey the Mandate of the Court of Appeals.

BY MR. RYDER: (72) As I said before, we felt constrained to present the issues which we have in our motion to discharge the rule to show cause to this Court.

I have been authorized by the Attorney General of Pennsylvania to inform this Court that we intend to file an application for a writ of prohibition to the Supreme Court, reluctant as we are to ——

BY JUDGE MURPHY: You mean a writ of prohibition to prevent the Court—on a case that has been going on from December 22, 1947—from bringing it to a head. Is that the position of the Attorney General of Pennsylvania?

BY MR. RYDER: We are very reluctant to take this course, but we feel the issues are of such nation-wide scope that we have no alternative except to do that.

BY JUDGE MURPHY: There was a murder committed on December 22, 1947; the matter was before the lower court, then before the Supreme Court of Pennsylvania on May 26,

1949; there was then a petition for certiorari to the Supreme Court of the United States; there was then a petition for writ of habeas corpus dismissed by the Supreme Court of Pennsylvania on August 12, 1949; there was then a petition for certiorari to the Supreme Court of the United States; on October 24, 1949 there were two orders of the Supreme Court of the United States denying the petitions for certiorari; on March 21, 1951 the matter was before the Board of Pardons and refused; on March 31, 1951 the Board of Pardons refused a rehearing; on April 2, 1951 there was a petition for certiorari (73) to the lower court and for reargument nunc pro tunc; that was denied on April 3, 1951; there was then a petition for a writ of habeas corpus presented to the District Court on April 3, 1951; a hearing on April 5, 1951; the matter was then continued to afford an opportunity to the Relator to go before the Supreme Court of Pennsylvania; a petition for a writ of habeas corpus was presented to the Supreme Court of Pennsylvania on April 9, 1951, and denied on April 10, 1951; the hearing was resumed before this Court on April 10, 1951; and concluded on April 11, 1951; at that time this Court dismissed the petition for writ of habeas corpus, felt there was no merit to it, and in view of the Relator having opportunity, in the Court's judgment, to go to the Supreme Court of Pennsylvania or to the United States Supreme Court for a stay order, we refused to grant it; the matter then came before Judge Maris on April 11, 1951, and Judge Maris of the Court of Appeals granted the stay order; on May 17, 1951 this Court dismissed the application for writ of habeas corpus; there was then an application or a petition for certiorari to the United States Supreme Court; that was denied on October 8, 1951; the appeal was argued before the Circuit Court on January 7, 1952, reargued on December 1, 1952, decided on March 24, 1953, and the amended decision on March 28, 1953; a rehearing denied on April 29, 1953; and then a petition for writ of certiorari

taken by the Commonwealth to the United States Supreme Court; that was denied on October 26, 1953.

So that after all of those movements have been taken and this Court is here with the witnesses ready to hear them in obedience to the Mandate of the Circuit Court, we understand the Attorney General's office feel that because of the gravity of the constitutional question that further delay should be (74) occasioned and that we should wait until such time as you have an opportunity to go to the United States Supreme Court and ask for a writ of prohibition in order to prevent the Court from carrying out the Mandate of the Appellate Court. Is that your position?

BY MR. RYDER: We are present in Court and ready to proceed. I made my argument on the ground we thought the Court didn't have jurisdiction. We think the Court does not have jurisdiction. We are here in Court ready to proceed. I have been authorized by the Attorney General to inform the Court what we intend to do. We don't wish to defer this matter any more. As I pointed out during my argument, we feel the basic fundamental issues are of such gravity ——

BY JUDGE MURPHY: Why didn't you later on proceed as you indicate now you intend to do in accordance with the instructions of your superior?

In all fairness to Mr. Ryder, what he is saying is—of course, the mere fact he announces he is going to ask for a writ of prohibition, it may be denied—he is arguing for the discharge. In the meantime this Court goes right ahead and we don't stop until prohibited.

BY MR. RYDER: Very well, sir. We are ready to proceed.

BY MR. MARGIOTTI: Mr. Walter Schroeder.

MR. WALTER SCHROEDER, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Schroeder, where do you reside?

A. Fairmont; Pennsylvania.

Q. What do you do?

A. I am a Deputy Clerk in the Court of Quarter Sessions in Bucks County.

Q. How long have you held that position?

A. Sixteen years, three months.

Q. Then you were holding this position at the time Foster and Zietz were tried—and Darcy?

A. Yes sir.

Q. And as such did you have charge of keeping the minutes of the proceedings?

A. No sir, I did not.

Q. Where were the minutes of the proceedings kept?

A. They were kept in the office but I did not keep them personally.

Q. I see. Was it the practice of your office to keep the minutes of the proceedings as cases progressed?

A. That is true, yes sir.

Q. Did you thereon record the different steps in the proceedings?

A. I assisted to a certain extent.

Q. Did you thereon record too the numbers of prospective jurors that were examined?

A. Yes sir, we did.

Q. And the disposition that was made in each case?

A. Yes sir.

Q. That is in the Clerk's record?

(76) A. Yes sir, that is right.

Q. And does it show the date of the indictment?

A. Yes, it did.

Q. Now, will you produce those records, please?

(Photostatic copy marked "Relator's Exhibit No. 1.")

BY MR. MARGIOTTI:

Q. I show you now "Relator's Exhibit No. 1"; Mr. Schroeder, tell me what that is.

A. This is a photostatic copy of the docket entries of Case No. 37, February Term, 1948.

Q. Would you mind raising your voice just a little?

A. This is a photostatic copy of the docket entries recorded in the Clerk's office at Doylestown, Oyer and Terminer Docket, No. 37, February Term, 1948.

Q. Do you have the original indictment in this case?

A. I have, sir.

Q. You don't have a photostat of this, do you?

A. No sir, I do not. I have a certified copy.

Q. Let me have a certified copy.

BY MR. MARGIOTTI: Is there any objection to using a certified copy?

BY THE COURT: I don't know.

BY THE WITNESS: Sir, the certified copy is part of the schedule we sent ——

BY MR. MARGIOTTI: I mean on the part of the Court.

BY THE COURT: We will rule on it when it is before us.

(77) BY MR. MARGIOTTI:

Q. Take it out. Do you know that "Relator's Exhibit No. 1" is a true and accurate photostat of the original docket entries?

A. I took it over to the photostat and that is what I got back. I will have to look at the docket.

Q. Did you certify it?

A. Yes sir, I did.

Q. Is the certification on that?

A. Yes sir, the certification is on that.

Q. Do you know whether or not it is a true and correct copy?

A. Yes sir, I do.

BY MR. MARGIOTTI: We offer it in evidence, Your Honor.

BY THE COURT: You offer what?

BY MR. MARGIOTTI: "Relator's Exhibit No. 1," which is the docket entries of the Zietz and Foster trial.

BY THE COURT: It also includes the indictment?

BY MR. MARGIOTTI: It doesn't include the indictment.

BY THE COURT: That is what I mean.

BY MR. RYDER: The indictment, at least, ought to be a part of the Supreme Court of Pennsylvania record on the direct appeal.

BY THE COURT: The only matter that is now before the Court is the offer of (78) "Relator's Exhibit No. 1," which includes only the docket entries. You are anticipating.

BY MR. RYDER: We have no objection.

BY THE COURT: All right, they will be received. The indictment as yet has not been offered.

(Certified copy marked "Relator's Exhibit No. 2.")

BY MR. MARGIOTTI:

Q. I show you now "Relator's Exhibit No. 2" so marked for identification only for the present, and tell me what that is. Speak loud enough so that the Court can hear you.

A. It is a certified copy of Indictment 37, February Sessions, 1948, Commonwealth of Pennsylvania v. Harold Foster, David Darcy, Harold Zietz and Felix Capone.

Q. Do you know where the original is?

A. Yes, here's the original.

BY MR. MARGIOTTI: If the Court please, we offer in evidence "Relator's Exhibit No. 2," being a certified copy of the indictment, as outlined by the witness, and I am returning the original to him, and I am only doing that so the Court can keep the original papers.

BY THE COURT: Is there objection?

BY MR. RYDER: No objection.

BY THE COURT: It will be received.

(79) BY MR. MARGIOTTI:

Q. Do you have the transcript of the testimony, as well as the examination of the prospective jurors on their voir dire, in the Foster and Zietz trial?

A. I do.

Q. Will you let me have it, please?

Mr. Schroeder, what is in the bundle—bags here?

A. That is the testimony and including the Foster and Zietz notes of testimony.

Q. Including something?

A. I don't have the volumes; there are five or six.

Q. There are five envelopes?

A. That is right.

Q. What did you say—including something?

A. I don't know what I said.

Q. I am wondering what you ——

A. That is what I want to say. It is the notes of testimony taken during the trial of Zietz and Foster.

Q. Do you know whether or not the notes of testimony—there were daily transcripts of testimony on this trial?

A. Yes sir, there were.

Q. Do you have any personal knowledge of who received the daily transcripts of testimony?

A. I don't just understand what you mean ——

BY THE COURT: Not to be technical but so that I will understand, do you mean there was a transcript of testimony made each day and available each morning, or do you mean throughout the trial there was made available a transcript of testimony?

BY THE WITNESS: (80) That is right. I believe it was taken by the Court Stenographer. I didn't see it until it was filed in the office of the Clerk of Quarter Sessions.

BY MR. MARGIOTTI: What I implied by my question—I am glad the Court asked the question—I got the wrong impression. I want to know whether or not the Reporter, as is here now, would every evening make a transcript of the testimony he had taken and then present it to the Court or District Attorney or Attorneys the next morning.

Q. Do you know?

A. I know nothing about it.

Q. Who was the Official Reporter that took that testimony?

A. Edgar Moore.

Q. Where is he from?

A. He is from Doylestown, Pennsylvania.

Q. Can you tell when the notes of testimony was filed in your office?

A. Not offhand, sir. They are on the front of the notes. They should be filed. They are in the docket. The docket will show that.

Q. Here's "Relator's Exhibit No. 1." Maybe you can tell from that.

A. I see here "September 18, 1948—Notes of Testimony Filed" pertaining to Harold Foster and Harry Zietz.

Q. Is there anything on the testimony itself to indicate that date?

A. Sir, I don't know. It is usually found on the back of the blue copy included among the volumes.

Q. Now this testimony which we will mark "Relator's Exhibit No. 3"—I haven't opened it up—but do you know whether it contains the examination of the jurors on their voir dire?

A. My recollection is that they do.

(81) (Exhibit marked Relator's Exhibit No. 3")

BY MR. MARGIOTTI: If the Court please, we offer in evidence "Relator's Exhibit No. 3."

BY MR. RYDER: We object as being irrelevant and immaterial.

BY MR. MARGIOTTI: The purpose of the offer is to show the crystallization of public opinion as shown by the examination of the jurors themselves while they were being examined under oath and to show, second, the extent to which the jurors read the newspapers and heard radio comments concerning the case of Foster and Zietz. The testimony is being offered for the purpose of laying the foundation to be followed up by other evidence by showing that this testimony was in some instances taken verbatim and in other instances summarized and published at large throughout the County while the case—while Harold Foster and Harry Zietz were being tried which had the effect of rekindling or lighting up a prejudice which had existed in the County where the case was tried.

BY MR. RYDER: I object to it on the grounds specified before.

BY THE COURT: As we understand it, the Foster-Zietz trial occurred one week before one panel of jurors; the Darcy trial occurred the following week before an entirely different panel of jurors. What may have been known by some of those in the first week's panel may be absolutely unknown to the second week's panel. It may be that there is some light in the way of showing what public sentiment was. It does not necessarily follow that it (82) in any way got to the minds of the jurors in the second week. However, so that the defendant—the Relator will be afforded an opportunity to have his case spread out, we will take it subject to the objection and reserve ruling thereon.

BY MR. RYDER: We have an understanding he is offering only a portion of that ——

BY THE COURT: No; he is offering the entire transcript consisting of five envelopes of papers which purports to be the entire transcript and he wants to show what happened on the voir dire, what questions were asked, what answers were made, what the evidence was and then to follow it up by showing, I assume, by word of mouth and by newspaper and by radio that these jurors that served on the Darcy trial heard about it.

BY MR. RYDER: We object.

BY THE COURT: Or that the general public was so inflamed to make a fair trial impossible, all right.

BY MR. MARGIOTTI:

Q. Now do you have your docket entries for the Darcy trial?
A. Yes.

BY THE COURT: This is just some indication of where cases like this get to.

(Copy marked "Relator's Exhibit No. 4")

BY MR. MARGIOTTI:

Q. I show you now "Relator's Exhibit No. 4." Do you know what that is?

BY THE COURT: (83) Let me add, Mr. Margiotti, although the cases get to that point, it is the Constitution that we are interpreting and, therefore, we have the whole problem before us.

BY THE WITNESS:

A. This, sir, is a carbon copy of the docket entries that we submitted to the Pennsylvania Supreme Court. It is listed on our original docket that I have over there with me. Certified as being true and correct; was entered in the regular docket.

BY MR. MARGIOTTI:

Q. Well, this contains an entry for each action as the case against Darcy progressed until March 15, 1949 when a certiorari to the Supreme Court came to hand?

A. Yes sir, that is correct.

Q. And is it complete and accurate?

A. Yes sir, it is, to the best of my knowledge and belief.

BY MR. MARGIOTTI: We offer in evidence "Relater's Exhibit No. 4."

BY MR. RYDER: No objection.

BY THE COURT: It will be received.

BY MR. MARGIOTTI:

Q. Do you have the testimony in the Darcy case?

A. Yes sir.

Q. You have produced five volumes; that is five envelopes which you called each envelope a volume. What do those five envelopes contain?

A. Notes of testimony in the Commonwealth versus ——

Q. Darcy ——

A. Darcy, yes sir.

Q. Do you have the notes of the voir dire examination?

(84) A. They are contained therein in Volume 1.

Q. In Volume 1?

A. Yes sir.

Q. Does Volume 1 contain anything except the voir dire examination?

A. It is really the first day of the trial. I believe, sir. I just really recall it is the first day of the trial.

Q. You took an envelope out of the batch?

A. Yes sir. It is one similar to this for submission to the Pennsylvania Supreme Court. It is just a routine matter.

BY MR. MARGIOTTI: May I give this just one number? Maybe I better give it two.

BY THE COURT: Yes.

We understand that counsel is having the list of numbers assigned to the transcript of testimony in the Darcy case, and we suggest if you do break it down you call it "5", then "5(A)", "B" and "C" and so on.

BY MR. MARGIOTTI: Yes sir; that is right. I am having it marked that way. (Exhibit marked "Relator's Exhibit No. 5(A), 5(B), 5(C), 5(D) and 5(E)," respectively)

BY MR. MARGIOTTI: The witness has produced five envelopes which have been marked "Relator's Exhibit No. 5(A), 5(B), 5(C), 5(D) and 5(E)." "5(A)" contains the transcript of the voir dire examination of the jurors—of prospective jurors and perhaps some testimony. The other four volumes contain testimony. We offer them all in evidence for the following purposes: "5(A)" is being offered for the purpose of showing a greater crystallization of prejudicial public opinion against the defendant David Darcy than (85) appeared in the previous trial of Foster and Zietz; the other four volumes of

testimony are being offered for any purposes which the Court may deem proper and particularly offered for the purposes of showing the conduct of Judge Boyer on one specific occasion, and also what occurred during one of the incidents referred to in the Petition when the District Attorney Biester obtained a note from Judge Boyer and walked up to the Judge at the end of the Judge's charge; and those two instances, Your Honor ——

BY JUDGE MURPHY: Mr. Margiotti, is there anything in that transcript about anything like that?

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: Where?

BY MR. MARGIOTTI: Toward the end.

BY JUDGE MURPHY: Point to the place where there is anything about him going up with the note.

BY MR. MARGIOTTI: No ——

BY JUDGE MURPHY: That is what you said.

BY MR. MARGIOTTI: You said: "Is there anything in the transcript like that?"

BY JUDGE MURPHY: Is there anything in the transcript of his—well, saying (86) just what you said?

BY MR. MARGIOTTI: Not about the note. We are going to prove the note. We are going to prove what occurred. We are going to prove by the transcript what took place at that time to corroborate the individuals who testify.

BY JUDGE MURPHY: What particular pages are you directing the Court's attention to in regard to Judge Boyer?

BY MR. MARGIOTTI: I have in mind one particular incident, Your Honor, and I think perhaps you remember this yourself, I won't have to refer to it, where Mr. Achey objected to Judge Boyer participating in the trial.

BY JUDGE MURPHY: Yes. I would like to have the particular page and I would like to know from counsel for both sides whether or not the jury was in the room at the time of that sidebar conference—whether you can stipulate or point out to the Court what happened.

The first question is where in the record did the Boyer incident occur? By "Boyer" I mean Judge Boyer.

While counsel are looking we might direct counsel's attention remember we made an observation as to where cases may get to. Here is a case: "'Intent' is state of mind difficult of precise proof." We say "state of mind" also is. You will find that in 100 F. Supp. 143, citing cases.

BY MR. MARGIOTTI: Your Honor, I call your attention first to Page 880 where it is marked "(Discussion at side-bar)," so I assume (87) it was at sidebar ——

BY JUDGE MURPHY: 880?

BY MR. MARGIOTTI: Pardon me! It is 830 and 831. The conversation is as follows ——

BY JUDGE MURPHY: Just a minute!
All right, you refer the Court to 830 and 831.

BY MR. MARGIOTTI: That is right.

The discussion is as follows—do you wish me to read it, Judge?

BY JUDGE MURPHY: Just one minute, please.

Now then, at 832 they apparently go back into testimony. Doesn't that appear to be right? They ask the question of Lieutenant Hanlon at the top of the page.

BY MR. MARGIOTTI: Yes, apparently that is correct.

BY JUDGE MURPHY: Right.

BY MR. MARGIOTTI: That is the way it looks to me.

BY JUDGE MURPHY: All right; my question is—it can be answered along the line if anyone knows—whether or not the sidebar discussion was—strike off the "was"—occurred while the jury was in the box or out of the box.

BY MR. MARGIOTTI: (88) We expect to prove it was while the jury was in the box.

BY JUDGE MURPHY: It would seem to be so because there is a call for an offer of proof on 829 and there is nothing to indicate the jury was excused, so that they were probably in the box at the time of the sidebar conference.

All right, go ahead.

BY MR. MARGIOTTI: What occurred there was this:

"MR. BHESTER: We offer to prove by CX-71 . . ." ——

BY JUDGE MURPHY: What occurred there is spelled out in the record.

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: Do you mean to vary the record in any way?

BY MR. MARGIOTTI: That is one of the purposes I am introducing the record ——

BY JUDGE MURPHY: You stand on the record as it is portrayed on 829, 830, 831; is that right?

BY MR. MARGIOTTI: And part of 832—to show that they went into testimony thereafter.

BY JUDGE MURPHY: Now, is there any other Boyer incident in the record of testimony?

BY MR. MARGIOTTI: Now, with reference—no, Your Honor.

(89) BY JUDGE MURPHY: Let's get the date on the charge and then we will keep it in order.

BY MR. MARGIOTTI:

Q. Is the charge in here?
A. Yes sir; it is in the last volume.

BY JUDGE MURPHY: We ask counsel: The charge of the Court doesn't occur in either of those two volumes, does it?

BY MR. MARGIOTTI: It is in a volume by itself.

BY JUDGE MURPHY: We have it as the 3rd volume. Page 864.

BY MR. MARGIOTTI: No; 904 starting with ——

BY JUDGE MURPHY: Starting at 904.

What about 864? It is headed "CHARGE OF THE COURT." I mean the charge of the Court starts—doesn't it—at 864?

BY MR. MARGIOTTI: Yes, it starts at 864; that is correct.

BY JUDGE MURPHY: You are referring particularly to 904, I take it.

BY MR. MARGIOTTI: From 904 to the end of the charge which appears on Page—the top of Page 907, or rather at the bottom of Page 906.

Now, Your Honor, that part of the story—that part of the testimony that is in the charge there does not give all the facts which I outlined about the note. What we propose to do is to put on the stand certain witnesses who observed what took (90) place. And Judge Boyer on several occasions went on the bench and participated in the deliberations with Judge Keller.

BY JUDGE MURPHY: I take it then you say you are going to challenge the accuracy of the record—of the transcript from 904.

BY MR. MARGIOTTI: Not necessarily because what occurred would not be on the record. I wouldn't expect it to be on the record.

BY JUDGE MURPHY: Do I take it you are now offering in evidence the charge of the Court commencing at Page 864 and calling the Court's attention to 904 et seq. and stating that you will follow it later by testimony pertinent thereto?

BY MR. MARGIOTTI: That is correct, and the two together tell the story.

BY JUDGE MURPHY: As I understand it, there is one reference to Judge Boyer in the entire transcript of testimony; isn't that so?

BY MR. MARGIOTTI: Particularly I think it was the one that was called to your attention.

BY JUDGE MURPHY: I say particularly or otherwise; isn't there only one reference to Judge Boyer?

BY MR. MARGIOTTI: Mentioning him by name, I think that is correct. We intend to call a number of witnesses to show he participated during the trial.

BY JUDGE MURPHY: As we understand it, counsel is saying to the Court there (91) is one place in the record—he had indicated the page—where Judge Boyer appears.

BY MR. MARGIOTTI: It appears in such a way as to indicate he was participating and Mr. Achey was objecting to his participating in the trial.

BY JUDGE MURPHY: That is argument. The question is is there anyplace else?

BY MR. MARGIOTTI: I don't think there is anyplace else. We propose to present what I mentioned at the time of the charge of the Court.

BY JUDGE MURPHY: Go ahead.

BY MR. MARGIOTTI: Has Your Honor ruled as to the admissibility of the testimony?

BY JUDGE MURPHY: I think we ruled long ago.

BY MR. RYDER: We have no objection to the portion of "5(A)," the voir dire examination, or to the admission of 829, 830, 831, 832 or Page 904 to the end of the charge. We do object to the admission of the rest of the record.

BY JUDGE MURPHY: You have already offered all of it before the Court already. Don't you remember? We read it in order to write our Opinion before. And you offered it. It is all before the Court already, copies of it. Here it is here. It was offered at the time by the Commonwealth and the Court read (92) every word of the 900 pages before it wrote its Opinion, and the Circuit Court says we did in the Opinion, and Judge Maris.

BY MR. RYDER: I will withdraw the objection.

BY JUDGE MURPHY: All right; they are admitted.

I might say, in all fairness to Mr. Ryder, you have all sorts of cases of this kind and we don't. Our memory may be a little sharper or finer, or whatever you call it.

BY MR. MARGIOTTI: If the Court please, may I call Your Honor's attention to the fact that in the minutes the name of Harry T. Westlake, a prospective juror, is marked, as far as the disposition of the case is concerned, "Excused by the Court," marked that way, and I call your attention in connection therewith to the examination of the juror on Page 96 and 97 in which he expressed an opinion concerning the Darcy case:

"Q. Have you formed any opinion as to the guilt or innocence of this defendant, David Darcy?

"A: Well, I think—yes, I have. It is one of the most cold-blooded murders I ever heard of."
Prior thereto three jurors had been selected and they were in the jury box ——

BY JUDGE MURPHY: As I understand it, you have called the Court's attention to the notes of testimony. I take it you are referring to your "Exhibit No. 1," which consists of a number of pages, and somewhere there the entry appears. Will you kindly tell us for the record where?

(93) BY MR. MARGIOTTI: It is Pages 96 and 97.

BY JUDGE MURPHY: May I see your "Exhibit No. 1?"

BY MR. MARGIOTTI: I don't think it is "Exhibit No. 1." Here's "Exhibit No. 1." It is "Exhibit No. 4" and Mr. Westlake is No. 29 thereon.

BY JUDGE MURPHY: On page what?

BY MR. MARGIOTTI: Page 4. It is "Exhibit No. 4" but No. 27 is the juror.

BY JUDGE MURPHY: On page what of "Exhibit No. 4?" You say that somewhere in "Exhibit No. 4" there is an entry he was excused by the Court. Where in "Exhibit No. 4?"

BY MR. MARGIOTTI: You have got it.

BY JUDGE MURPHY: Where? There is about 80 people.

BY MR. MARGIOTTI: Where it says 27th juror I think it is. They are numbered 1, 2, 3, 4, 5 in the beginning.

BY JUDGE MURPHY: Juror 27 is Nicholas Mislan. Juror 29 is Harry T. Westlake.

BY MR. MARGIOTTI: That is the man.

BY JUDGE MURPHY: As I understand it, you don't mean he was excused by (94) the Court before the trial and then called in to make this assertion.

BY MR. MARGIOTTI: No.

BY JUDGE MURPHY: You mean the minutes show he was excused by the Court and on Page 96 et seq. is his examination.

BY MR. MARGIOTTI: That is right; in which he expressed an opinion in the presence of all the other jurors, which goes to the——

BY JUDGE MURPHY: You say he made it before all the other jurors. All the other jurors were in the grand jury room.

BY MR. MARGIOTTI: I said three.

BY JUDGE MURPHY: The prospective jurors weren't in the room.

BY MR. MARGIOTTI: I don't think so; I don't know.

BY JUDGE MURPHY: We wish you would check and find out.

BY MR. MARGIOTTI: I will do that.

BY JUDGE MURPHY: We understand they were in one

room and called in one at a time seriatim and examined and they did not remain in the room; they were either excused or put in the box and another juror called out from another room.

BY MR. MARGIOTTI: What I had in mind was to call your attention to his testimony. It would be in "5(A)" and 96 and 97.

(95) BY JUDGE MURPHY: We note at 97 when that occurred there was a motion for a new trial—a mistrial and the motion was denied.

BY MR. MARGIOTTI: The motion was denied and the Judge instructed the jury to pay no attention to it.

BY JUDGE MURPHY: Right?

BY MR. MARGIOTTI: That is correct.

BY JUDGE MURPHY: Judge Watson asks the question. Certainly it is in the affirmative? This was before the Supreme Court when the motion for a new trial was argued. The transcript was there.

BY MR. MARGIOTTI: I didn't argue this question.

BY JUDGE MURPHY: I know that. You weren't there when Mr. Schofield, Mr. von Moschzisker's son—I don't mean Mr. Schofield—Mr. Thomas McBride, Chief Justice von Moschzisker's son and Mr. Achey were there and didn't raise the proposition.

BY MR. MARGIOTTI: That is right, and I have wondered why they didn't but they didn't raise it anyhow.

BY JUDGE MURPHY: The fact is that they didn't.

BY MR. MARGIOTTI:

Q. Now can you tell us by looking at the record how many jurors were in the panel in the Foster-Zietz trial?

A. May I use the docket? I think I can find it better in the docket.

(96) BY JUDGE MURPHY: Yes sir.

BY THE WITNESS: I have the original docket here.

BY JUDGE MURPHY: All right.

BY THE WITNESS: Would you mind stating the question?

BY MR. MARGIOTTI:

Q. How many jurors were in the panel in the Foster-Zietz trial?

BY JUDGE MURPHY: When?

BY MR. MARGIOTTI: That were examined.

BY JUDGE MURPHY: It could be three or four sets. You call so many, so many are excused, so many appear, so many are examined.

BY MR. MARGIOTTI: There is the record there. I have never seen that.

BY JUDGE MURPHY: Then will you inquire?

BY MR. MARGIOTTI:

Q. Do you know how many jurors were examined of the regular panel?

A. 78.

Q. Will you state whether or not that panel was exhausted?

A. According to the record, it was.

Q. And how many veniremen were selected—or something?

A. Of the 78 original, 8 were selected.

Q. No, no. How many more were sent for; how many veniremen; how (97) many jurors did the sheriff go out and get?

BY JUDGE MURPHY: Talesmen.

BY MR. MARGIOTTI: Talesmen.

BY THE WITNESS:

A. 50 persons.

BY MR. MARGIOTTI:

Q. 50 persons. Was that exhausted too? Were those 50 examined?

A. Those 50 were examined. They didn't get a juror out of those 50; so they called another 50 subsequently.

Q. Then called how many more?

A. 25.

Q. And then was a jury selected out of the balance of the 25?

A. Yes sir; out of the 25.

Q. Do you know how many of the 25 were examined?

A. 17.

Q. 17 out of the 25. Now we go to the Darcy case. Do you

know how many jurors were examined in the Darcy case? You can look at your docket-entries.

A. There was 81.

Q. 81 ——

BY JUDGE MURPHY: Now just one minute, please.

BY MR. MARGIOTTI:

Q. Will you state whether the jury ——

BY JUDGE MURPHY: Just one minute, please.

BY MR. MARGIOTTI: (98) Pardon me!

BY JUDGE MURPHY: All right, go ahead.

BY MR. MARGIOTTI:

Q. Will you state whether or not the jury were selected out of the 81?

A. They were selected out of the 81.

Q. That were examined?

A. That is right.

BY JUDGE MURPHY: Wait a minute! Let's have no confusion. Do you say all 81 were examined?

BY THE WITNESS: Yes sir; in the Darcy matter 81 were examined.

BY JUDGE MURPHY: Go ahead.

BY MR. MARGIOTTI:

Q. And the jury was selected out of the 81?
A. Yes sir.
Q. Did they send out for any jurors?
A. No sir; that was the original panel.
Q. That was the original panel ——

BY JUDGE MURPHY: Let me see the book you are reading from. Just a minute, please. Go ahead.

I just want to straighten one thing out. Apparently, according to what they say here and what the Court's recollection was, there were 14 selected, as I understood, from the 81. I don't know. You find out. You have only 12 selected so far.

(99) BY MR. MARGIOTTI:

Q. What—did you have alternates in the Darcy case?
A. That is what it includes, 12 regular jurors and 2 alternates.
Q. Did the two alternates come out of the 81?
A. Yes sir, they did.
Q. They did. So that you have 14 out of the 81?
A. That is true.

BY JUDGE MURPHY: While you are at that, let me ask one question. Were there alternates the week before?

BY THE WITNESS: Yes sir. Wait! I will check that back on the docket.

BY JUDGE MURPHY: They are only details but we might just as well be right.

BY THE WITNESS: Yes sir, there were alternates in the Foster-Zietz case as well.

BY JUDGE MURPHY: There were what?

BY THE WITNESS: There were two alternates in the Foster-Zietz case.

BY MR. MARGIOTTI:

Q. In other words, there were 14 selected out of that number, you say?

A. Yes sir, that is right.

Q. Now do you know whether any of the jurors of the week during which Foster and Zietz were tried were held over for duty the following week?

A. I don't believe there were.

(100) Q. Do you know?

A. I don't recall. I can't remember that far back.

Q. If any of them had been held over, would that show in your minutes?

A. That would show in the Court calendar for that particular period that they were only drawn to serve one week and at the termination of this trial would be automatically excused because it is customary ——

Q. The ones that were jurors would be automatically excused. What about the ones that weren't jurors? Were any of them held over for the followig week?

A. No sir.

BY JUDGE MURPHY: You don't mean what you said, I take it. You said: "Were any of them held over for the following week?"

BY MR. MARGIOTTI: Yes sir.

BY JUDGE MURPHY: Was that what you answered?

BY THE WITNESS: I said no, they weren't held over, they only served one week.

BY MR. MARGIOTTI:

Q. Can you tell me when these jurors for the Darcy case were summoned?

BY JUDGE WATSON: Were they ever summoned for any particular case?

BY MR. MARGIOTTI: They were ——

BY JUDGE WATSON: (101) You say—you mean when were they summoned for that week?

BY MR. MARGIOTTI: For that week, that is right.

Q. Do you know when the jurors that served during the week Darcy was tried—do you know when they were summoned, not particularly the Darcy jury but all the jurors for that week?

A. Well, our terms of Court of Quarter Sessions generally run three weeks. The grand jury would be followed by two weeks of traverse jurors. The regular way would be to notify these people to be there about ten days before the actual term that they are supposed to serve.

Q. When does that term begin?

A. Well, I don't have a Court calendar. I just don't remember what—Foster and Zietz, they were tried first. Apparently they were tried the week of May 24, 1948, and they perhaps were summoned maybe around the 12th or 14th to appear for jury service for that particular week. They are figured—whatever it amounted to—eighty-some people.

Q. What I am trying to find out is were these jurors summoned all at the same time or separate times?

BY JUDGE MURPHY: Do you understand the question?

BY THE WITNESS: Yes sir, Your Honor.

The usual way in Bucks County this group of jurors were summoned for that particular week, not that they were going to serve on any particular case; they come in the regular jury week (102) for traverse jurors, the regular term of court. There would be 120 and ones who would come there would be numerous excused by the Court. In other words, in this case Foster and Zietz there were ——

BY MR. MARGIOTTI: Read my question, Mr. Butler

(Question read by the Reporter.)

BY THE WITNESS:

A. I just don't recall how many people they brought in that particular week. That has been a long while ago.

BY MR. MARGIOTTI:

Q. Ordinarily, how long before the jurors report are they summoned?

A. They are summoned about ten days to two weeks before that actual time they report. The sheriff sends that out. I don't have anything to do with it.

Q. Ten days or two weeks to report?

A. I would say offhand ten to fourteen days before the actual week they are supposed to be there they are summoned or given notice.

Q. You say the sheriff does that?

A. Yes, the sheriff does that.

Q. Do you know if there was a venire issued for the jury?

A. There was a venire. I don't have it here. I can't tell the exact date.

Q. You can't tell when it was issued?

A. No sir, not from this record.

Q. Or any other papers you have here ——

BY JUDGE MURPHY: The question is when did the venire issue for the week of June 7, 1948?

(103) BY THE WITNESS: Yes sir, I can.

"In the name and by the authority of the Commonwealth of Pennsylvania

"Honorable Hiram H. Keller, President of the Seventh Judicial District, consisting of the County of Bucks . . ." ——

BY JUDGE MURPHY: No; the date that was issued.

BY THE WITNESS: Well, it states there to be there—that is the first week—the 17th day of May 1948.

BY MR. MARGIOTTI:

Q. That is for the first week?

A. Yes sir. There there is another venire and it states here—it says this bunch of jurors is to serve for one week.

Q. That bunch served for a week; all right. Would you have anything for the next bunch?

A. Commencing on the 17th day of May 1948. It says:

". . . to serve for the term thereof commencing on the 1 day of June 1948 . . ."

Q. That is for the whole term?

A. Yes sir.

Q. How long was your term?

A. Well, the term generally runs two weeks, three weeks including a grand jury. That is the usual schedule.

Q. And so your record shows that your jurors were summoned then to appear on May 17th for the whole term?

(104) A. That is right.

Q. I though you said the jurors were excused after the first week?

A. That is the ordinary practice I said.

Q. I don't want to know about the ordinary practice. I want to know what happened in this case, according to the record.

BY JUDGE MURPHY: We suggest that you have it copied into the record as is, the venire itself. As we understand it, it says they are summoned to appear for the term commencing on the 24th day of May 1948; and, as we understand it, the Zietz trial did not occur that week at all.

BY MR. MARGIOTTI: No, but the pressure of the term makes some difference.

BY JUDGE MURPHY: If you are talking about "term," it may be civil cases. The Zietz case was a week before Darcy. That was May 24. Maybe Foster and Zietz lasted two weeks; I don't know.

BY MR. MARGIOTTI: I am going to withdraw you as a juror. Can you check and find out when these venires were issued tonight and bring that information with you tomorrow morning?

BY JUDGE MURPHY: Find out if there was a venire issued for the week of the Foster-Zietz trial. If so, when? Was there a separate venire issued for the Darcy trial? If so, when?

BY MR. MARGIOTTI: May we ask that question, that is whether any jurors for the week of the Foster-Zietz trial—not jurors that were—on that case were held over?

(105) BY THE WITNESS: I see what you mean.

BY MR. RYDER: On Foster I would suggest that Mr. Margiotti ought to have the sheriff here.

BY JUDGE MURPHY: Except the venire is signed by the Court, isn't it?

BY MR. RYDER: I suppose the venire is but I presume the sheriff carries it out.

BY JUDGE MURPHY: The venire would be issued and signed by the Judge, and they have in these courts, as everyone knows in the law, they have jurors for civil trials and they have jurors for criminal trials, and apparently this gentleman has read from Page 329 of the Oyer and Terminer Criminal Docket 1943 to —— Bucks County as follows:

"May Term A. D. 1948

Bucks County, SS.

In the name and by the authority of the Commonwealth of Pennsylvania

Honorable Hiram H. Keller President of the Seventh Judicial District, consisting of the County of Bucks, by virtue of said office, justice of the Courts of Quarter Sessions of the Peace and Oyer and Terminer and general jail delivery, for the trial of capital and other offenses in and for the said County.

To the Clerk of the Courts of Quarter Sessions of the Peace and Oyer and Terminer and general jail delivery of the County of Bucks, greeting:

(106) We order and direct that you issue a venire to the Sheriff and Jury Commissioners of Bucks County, aforesaid commanding the said Sheriff and Jury Commissioners to empanel, and the said Sheriff to summon, a traverse jury in the Courts of Quarter Sessions of the Peace and Oyer and Terminer

and general jail delivery; consisting of 120 qualified according to law, to make up the jury requisite to inquire of and perform all those things which on our part shall be enjoined upon them, at the term thereof to be held at Doylestown, in and for the County of Bucks, commencing on the 17 day of May A. D. 1948, next after the date of this precept, to serve for the term thereof commencing on the 24 day of May A. D. 1948, dated at Doylestown, this 12 day of April A. D. 1948."

Now then, on Page 331 of the same book there is a different venire ordering the jury to commence their services on the 1st day of June 1948.

You take it up from there, General.

BY MR. MARGIOTTI: All right.

Q. Mr. Schroeder, what is that entry that the Court has just read, the venire for June 1, 1948?

A. Well, that is the second week of the traverse jury for that particular May term 1948. They were summoned to appear on the——

Q. Would that be the jury that would be—of which the Darcy jury was selected?

A. Which date is the Darcy trial started, or do you have it?

(107) BY JUDGE MURPHY: You agree it was started on June 7?

BY MR. MARGIOTTI: It started on June 7.

BY JUDGE MURPHY: The following week.

BY MR. MARGIOTTI: The following week, on Monday, June 7.

BY THE WITNESS: This starts on the 1st day of June.

BY MR. MARGIOTTI:

Q. Would that jury be there for two weeks or three weeks or how long?

A. According to the docket entry, this jury starts service on the 1st day of June 1948.

Q. And for how long?

A. To serve for the term thereof.

Q. And how long was the term?

A. I don't know how long the term lasted; I can't tell; it is too far back.

Q. Do you know how long your criminal term is for in Bucks County?

A. As I say, they usually last three weeks, one week of grand jury, two weeks of traverse jurors. That is the usual way.

Q. My experience has been in some of the small courts they last three months; in big cities it lasts 30 days. I have known none shorter than 30 days.

BY JUDGE MURPHY: We understand the question we are confronted with is Bucks County at the time in question.

(108) BY MR. MARGIOTTI: Exactly. I think a big county has four terms.

BY JUDGE MURPHY: The practice, according to what has been told to the Appellate Court in this case, was a different panel each week. Now whether there was a different panel we would like to know. According to the Court, they say there was an entirely different panel.

BY MR. MARGIOTTI: May we excuse this witness?

BY MR. RYDER: We are willing to allow the witness to be excused providing we have the right to cross-examine him.

BY JUDGE MURPHY: Al right, the witness is to come back in the morning. He is to find out what he means by the term, venire by the President Judge; when was the venire issued for the week of the Foster-Zietz trial; when was the venire issued as to the Darcy trial; and when they were summoned in each respective week?

BY MR. MARGIOTTI: And were any of them held over?

BY JUDGE MURPHY: Do you understand?

BY THE WITNESS: I don't have no way of getting home. I live 116 miles from here. I was brought up by a man.

BY JUDGE MURPHY: If you are going to that expense, we suggest you arrange with Mr. Margiotti.

BY MR. MARGIOTTI: (109) Since counsel's expense is going to Washington ——

BY JUDGE MURPHY: That is neither here nor there. Counsel asked this witness to take a trip of 100 miles, working for you, to get that information. The question is who is going to pay it?

BY MR. MARGIOTTI: We will pay it if we have to. I would sooner have the Commonwealth pay a half of it.

BY THE WITNESS: Furthermore, I don't know if I am in position to get—I don't know what the situation will be in Doylestown when I get there, so far as getting this information, whether the sheriff's office will be open, whether I have access ——

BY MR. MARGIOTTI: The District Attorney can get

that information over the phone. If he gets it and reads it into the record, I will agree to it. That will save me a few dollars.

BY MR. RYDER: I doubt that all of the information Mr. Margiotti desires can be obtained over the phone. The Court House closes promptly at 4:00 o'clock. It will not be opened again until 9:00 o'clock tomorrow morning. As I understand it, these matters are matters that are probably in the hands of the sheriff, certainly as to the actual time the summons went out.

BY JUDGE MURPHY: There is nothing before the Court. We understand that the request has been made that the witness be withdrawn from the stand with the right to recall him tomorrow, to which the Commonwealth has no objection.

(110) (Witness excused)

REVEREND FRANK J. DAMROSH, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Reverend, where do you live?

A. Doylestown.

Q. How long have you lived there?

A. Eighteen and one-half years.

Q. Were you there during the trial of Foster-Zietz and Darcy?

A. I was.

Q. Did you—I see you are a minister. May I ask you what church?

A. St. Paul's Episcopal Church.

Q. St. Paul's Episcopal Church. And where is your church located?

A. Oakland and Pine Streets, Doylestown.

Q. State whether or not you became acquainted with any of the boys mentioned.

A. I did.

Q. Which one or ones?

A. Harold Foster.

Q. You didn't become acquainted with Darcy?

A. No more than a nodding acquaintance. I didn't have any chance to converse with him.

Q. Do you remember the time that Darcy's case came up for trial?

A. I do.

Q. At that time had Zietz and Foster's trial been held?

A. Well, my recollection is that it was the week before.

Q. All right; now are you acquainted with the people in and about Doylestown and Bucks County in a general way?

A. Well, after living eighteen years in a place you get to know a (111) good many people.

Q. Yes, you would, Reverend. And will you state whether or not on the June 7 that Darcy was placed on trial whether you were acquainted with the expressions of the public of Bucks County concerning Darcy?

A. That is a hard question to answer specifically, because I also—I was as acquainted with it as anybody else and in particularly more so.

Q. Did you hear people express themselves concerning the Feasterville killing?

A. Well, of course.

Q. And these people whom you heard express themselves where were they from with reference to the County?

A. Well, as I have already said, my acquaintance is chiefly in and around Doylestown, and naturally more with the people of my own parish than with others. I would hesitate to make any specific answer to your question because I wouldn't know just what people I had talked to in that period.

Q. Were they generally from around Doylestown or further out in the County?

A. Doylestown and within a radius of some 10 or 12 miles, I would say.

Q. Reverend, what would you say was the feeling existing at that time?

BY MR. VAN ARTSDALEN: That question is objected to, calling for a conclusion.

BY JUDGE MURPHY: Well, we will take it subject to the objection.

BY MR. MARGIOTTI: What was the objection?

(112) BY JUDGE WATSON: Well, he just objected anyway.

BY MR. MARGIOTTI: Just objected; all right.

BY THE WITNESS:

A. Would you repeat the question?

BY JUDGE MURPHY: What time?

BY MR. MARGIOTTI: At the time of the trial.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

BY MR. MARGIOTTI: At the time Darcy was placed on trial.

BY THE COURT: The Court has made a request. Repeat the question as amended.

(Question read as amended as follows: "Q. Reverend, what would you say was the feeling existing at that time, at the time Darcy was placed on trial?")

BY THE WITNESS:

A. I couldn't possibly after the interval of years that has elapsed try to pin down my recollections as to what reactions I heard at what specific times.

BY MR. MARGIOTTI:

Q. Well, can't you tell—do you have any idea when you got do you know what the reaction was of the people?

A. My answer is the same. I remember reactions throughout this episode beginning from the time of the murder up through the (113) trial, a period of a considerable number of months. I couldn't possibly sort out impressions and pin them down to any given point of time.

Q. Well, at the time that Foster and Zietz were being tried the impressions from the public any time before the time?

BY JUDGE MURPHY: Do you understand that question?

BY THE WITNESS: I understand it.

I simply repeat I have impressions of things that were said

to me both in my parish and people outside of it during the course of this episode, but I can not pin down any of those recollections to specific dates.

BY MR. MARGIOTTI:

Q. From what date did you continue to have these impressions?

A. What did you say?

Q. Up until what date did you continue to have these impressions without pinning them down to any specific time?

A. I am sorry to be unable to answer questions. The same answer goes. They are still going on. Every time anything appears in the paper about this case you meet people and you get remarks. My impressions of this case are spread over a period of some six years or more, and I can not be more specific than that.

Q. Will you state whether or not those impressions have been the same during that period?

A. Yes; in general I would say yes.

Q. Will you state now what was the public opinion during that period?

BY MR. VAN ARTSDALEN: That is objected to, what the public opinion may be after (114) the trial was held.

BY JUDGE MURPHY: We will take it subject to the objection.

BY THE WITNESS:

A. I don't feel qualified to make a statement under oath as to what the public opinion was in the town. I can only answer specific questions about, let's say, if you asked me where I got

these opinions from specifically, or something like that. But I am not qualified to make an answer which would commit me to say that I thought public opinion as a whole was so and so. I am not qualified for that. I can't say. I can only say what the personal impression was I received from specific persons.

BY MR. MARGIOTTI:

Q. Did you come to any conclusion yourself as to whether there existed in Doylestown and Bucks County any prejudice against this defendant?

BY MR. VAN ARTSDALEN: That is objected to.

BY JUDGE MURPHY: As of when?

BY MR. MARGIOTTI: At any time during the six years.

BY JUDGE MURPHY: The objection is sustained. If you will pin-point, we will allow it, but you are over a long period now.

(115) BY MR. MARGIOTTI: I withdraw the question.

Q. Did you come to any opinion—just answer this question yes or no without stating anything about it—did you come to any opinion as to whether or not there was any prejudice in Bucks County against this defendant, Darcy?

A. I would like—before I answer yes or no to that question I would like an answer to this question of my own: What do you mean by "prejudice"? If you ask me feeling, indignation, reactions and so on, I can give an answer but what do you mean by the word "prejudice"?

BY JUDGE MURPHY: We think the proper question——

BY MR. MARGIOTTI:

Q. Personal feeling of animosity, personal feeling of guilt against him; personal feeling involving the nature of the trial he should have.

A. I can. You are asking me what my personal opinion was of the situation and I will say that it was—there was very great indignation, a great deal of feeling of antagonism towards the defendants and a general feeling that they were all guilty. Now that I can say is my opinion of that, but the word "prejudice" I would not be willing ——

Q. When did that feeling begin, as you have stated?

A. I have already said I can not be pinned down as to dates. I would say it began when the murder was first committed, when the news first broke.

Q. How long did that continue—up to the present time?

A. Yes.

BY MR. MARGIOTTI: (116) That is all.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Reverend, were you in Doylestown during the week of the Darcy trial and also during the prior week of the Foster-Zietz trial?

A. I was.

Q. Did you attend any of the hearings in the Court at that time?

A. I attended a portion of one session of the Zietz-Foster trial; none of the Darcy trial.

Q. You don't recall which particular session that was, do you, Reverend?

A. I do not.

Q. Now you have stated, I believe, that there was a feeling of great indignation. Would you say there has been a feeling of great indignation in other serious criminal offenses that have been committed?

A. Yes.

Q. Would you say that there was any greater or stronger feeling about these cases than other important criminal cases?

BY MR. MARGIOTTI: We object until we know what cases are involved.

BY JUDGE MURPHY: The objection is overruled. We are in a wide field now, the state of mind in a community.

BY THE WITNESS:

A. I would say that there are occasional cases which arouse an equal indignation. If you want me to be specific, I can refer to the Kapps case. But I would also say that with the exception—with the possible exception of that, I can recall no other case in 18 years in Bucks County that aroused the state of (117) feeling that that one did.

BY MR. MARGIOTTI: Which one?

BY THE WITNESS: This Darcy-Zietz-Foster case.

BY MR. VAN ARTSDALEN:

Q. Now a great deal of the state of public opinion you have referred to referred to things that occurred after the case was tried?

A. I have already answered I can not and I do not intend

under oath—intend to specify what impressions I got before during and after the trial. I can't after six years sort those things out and I shouldn't attempt to.

Q. Father, were there any unusually large crowds in and about Doylestown during the time of that trial, or do you recall?

A. I do not recall.

Q. I take it, Father, that your recollection of the things that occurred in Doylestown during the actual week of the Darcy trial are somewhat hazy at this time, is that correct?

A. I wouldn't say that, no. I remember specifically that there was naturally more talk, more discussion, more argument about the case while the trial was going on than either prior or since it. All I can say is I would not attempt to pin down my recollections of things that was said to me to any one period.

BY MR. VAN ARTSDALEN: That is all.

BY JUDGE MURPHY: You have said there was a general feeling that they were all guilty; you have also said there was an antagonism towards (118) the defendants. Was there any violence shown in the community foward them?

BY THE WITNESS: Not to my knowledge.

Your Honor, I may say, so far as my testimony is concerned, it is naturally based mostly on the reactions within my own parish, the conversations that I had, partly as the result of the things which I said probably about the case, and I measure my recollection largely from that although, as I said before, I did also talk to a number of other people.

BY JUDGE MURPHY: Are you aware of anybody going anywhere near the Courthouse with guns or clubs or making any disturbances during this trial?

BY THE WITNESS: I am not.

BY JUDGE MURPHY: Did you hear of any such thing having occurred in that community?

BY THE WITNESS: Not to the best of my recollection.

BY JUDGE MURPHY: Well then, if there was a general feeling and if there was an antagonism towards the defendants and great indignation, was it apparent in any way except vocally and perhaps a display of emotion?

BY THE WITNESS: That is all. From my personal knowledge, I don't know of anything having happened. But I know of no other type of (119) display.

BY JUDGE MURPHY: I might say for the record I am asking these questions more in view of the situation in Moore v. Dempsey and Frank v. Mangum.

Is the witness excused by both gentlemen?

BY MR. MARGIOTTI: Yes sir.

(Witness excused.)

BY JUDGE MURPHY: It is now two minutes to four. We will adjourn until 10:00 o'clock tomorrow morning.

(Court adjourns for the day.)

(Court resumes on March 12, 1954, with all parties, including the Relator, David Darcy, present in Court.)

MR. WALTER SCHROEDER, recalled.

DIRECT EXAMINATION (Continued).

BY MR. MARGIOTTI:

Q. Mr. Schroeder, when you left the stand yesterday afternoon you were to make an effort to get some information which we were interested in. Did you get that information?

A. I got all I could of it. I got the venire and the precept of the jurors for this particular term of court.

Q. May I have those? What did you say you have here?

A. I have the precept of the grand jury and then there were traverse jurors for that particular term of court; May sessions 1948.

Q. Now I see. Will you produce now for me—at least identify the venire for the week that Zietz and Foster were tried, which one is it?

A. The 24th of May. This is the Zietz-Foster jurors.

(120) Q. And the one of June 1, what is that?

A. That would be the Darcy group of jurors for the traverse.

Q. You don't have copies of those, do you?

A. No sir, I do not. The sheriff's office would have copies.

Q. Well for the present we will use these.

(Exhibit marked "Relator's Exhibit No. 6"; Exhibit marked "Relator's Exhibit No. 7.")

BY MR. RYDER: There is a question concerning their admission into evidence. I am going to make an objection on the ground these are original records of the Court of Oyer and Terminer of Bucks County. While we may have no objection to the admission of certified copies, we certainly object to the admission of original records. It seems that is going pretty far

to allow a litigant to offer in evidence original records of the Court of Pennsylvania ——

BY JUDGE MURPHY: Is that your only objection?

BY MR. RYDER: Yes. So far as admissibility otherwise is concerned, we would have no objection.

BY JUDGE MURPHY: Your objection is overruled. Certainly there is no reason why if the records of any court in the world that were subject to the process of this Court that add any light on the question to be decided—no reason why they shouldn't be produced. However, in order that the records of the Court may be available for the use of that Court it is quite possible that photostatic copies could be substituted, or certified copies could be substituted.

BY MR. RYDER: (121) I made that suggestion in the course of my objection.

Now we have the same objection to the transcript of testimony offered yesterday in the case of Foster and Zietz and also Darcy. It was my understanding at the time—it wasn't my understanding at the time that those were the original records of the Court of Oyer and Terminer. Now the Court has before it, as I recall, a copy of the notes of testimony taken down in the course of the trial of Darcy ——

BY JUDGE MURPHY: Yes, supplied by the Commonwealth.

BY MR. RYDER: Yes, supplied by the Commonwealth. We have no objection to the substitution of that copy for the original, but we are confronted with exactly the same problem which I mentioned with respect to these exhibits, the venire ——

BY JUDGE MURPHY: What we have here is a fundamental problem. For years and years it was the practice of the Appellate Courts to insist upon one seeking justice, or to seek a review of what occurred in the lower court, for him to go to the expense of hundreds and perhaps thousands of dollars to reproduce, and the Third Circuit have a rule that to obviate the necessity of such great expense you can bring up the original record, and this record in the hands of this Court will be properly and adequately protected and we don't think there should be the necessity of having it typed over again and making copies of perhaps thousands of pages of testimony. It will be protected while it is in the hands of this Court.

BY MR. MARGIOTTI: At this time I offer in evidence "Relator's Exhibits Nos. 6 and 7."

(122) BY JUDGE MURPHY: Identified as——

BY MR. MARGIOTTI: Identified as an order to the sheriff and jury commissioners of the County to call certain jurors——

BY JUDGE MURPHY: "No. 6," order being dated for identification——

BY MR. MARGIOTTI: Being dated April 12, 1948, and requesting the jurors to appear on the 24th of May 1948. And "No. 7" is dated the 12th of April 1948, requesting the jurors to appear on the 1st day of June 1948 at 10:00 o'clock in the forenoon of that day.

BY JUDGE MURPHY: It would look from those dates if that was carried out that the jury that was going to try the Darcy case was ordered to appear the week previous to the case being called. Certainly it would be something that ought to be

clear, whether or not they did appear on the 1st of June whereas the case was not called until the 7th of June and whether or not they were in the Courtroom during the Foster-Zietz trial. Go ahead.

BY MR. MARGIOTTI:

Q. Do you know when these jurors did appear?
A. No, I do not; I don't remember.

BY MR. MARGIOTTI: Your Honor, I have here in my possession the original order signed by Judges Keller and Boyer with reference to the jurors on the 24th of May and the 1st of June directing them in the name of the authority of the Commonwealth to summon said jurors.

I think, in order to shorten the record, Mr. Ryder (123) and I can agree as to what it contains thereof. Is that satisfactory?

BY JUDGE MURPHY: Judge Watson has made what I think is an excellent suggestion that if counsel feel it is material as to when these people appeared, certainly in that courthouse there are report records and pay records. If they were there they certainly looked for their pay.

BY MR. MARGIOTTI: I had that in mind.

BY JUDGE WATSON: This isn't any help to us at all.

BY MR. MARGIOTTI: The witness has told me the sheriff himself is going to be here who knows those facts.

BY JUDGE MURPHY: The sheriff would certainly have nothing to do with the pay of the jurors.

BY MR. MARGIOTTI: But he knows when those jurors appeared.

BY JUDGE MURPHY: The best evidence would be the pay records unless he is going to take each one and say he remembers when 120 jurors appeared.

BY MR. MARGIOTTI: I think that suggestion is very excellent and we will try to get it.

If the Court please——

(Exhibit marked "Relator's Exhibit No. 8"; Exhibit marked "Relator's Exhibit No. 9.")

BY MR. MARGIOTTI: (124) If the Court please, I offer in evidence "Relator's Exhibit No. 8" and "Relator's Exhibit No. 9."

BY JUDGE MURPHY: What about "6" and "7"?

BY MR. MARGIOTTI: They have been offered.

BY JUDGE MURPHY: They have not been offered. They have been identified.

BY MR. MARGIOTTI: I thought I offered them.

BY JUDGE MURPHY: I don't think so.

BY MR. MARGIOTTI: If I didn't offer them, I offer them now.

BY MR. RYDER: I object on the grounds stated before. They are the original records of a Court of record of the Commonwealth of Pennsylvania. We have no objection, if the

Court please, to the introduction of certified copies of those exhibits.

BY JUDGE MURPHY: All right. "Relator's Exhibits Nos. 6 and 7" will be received in evidence with the understanding since they consist of only two pages that photostatic or certified copies may be substituted in lieu thereof.

BY MR. MARGIOTTI: If the Court please, we offer in evidence "Relator's Exhibits Nos. 8 and 9," which are the original orders of the Court to the sheriff to summon the jurors for the 24th day of May 1948 and June 1, 1948.

BY MR. RYDER: (125) Same objection as to the previous offers.

BY JUDGE MURPHY: Same ruling with the understanding that certified copies or photostatic copies may be substituted in lieu thereof.

BY MR. MARGIOTTI:

Q. You may put that in your pocket.

BY JUDGE MURPHY: Don't put anything in your pocket that you have read the contents thereof.

BY MR. MARGIOTTI: I told the witness to put a paper in his pocket and I want the Court to see what that paper was. Your Honor raised a question about it. It is a direction to call grand jurors. I didn't think it was important in this case. You had ——

BY JUDGE MURPHY: Will you let me see the indictment, please?

Now then, Mr. Margiotti, you have called to the Court's attention the order of the Court signed April 12, 1948, calling the grand jury to meet on May 17, 1948. But the indictment is dated in February.

BY MR. MARGIOTTI: That is correct.

The reason I called it to your attention is merely to show it had nothing to do with this case.

BY JUDGE MURPHY: You state the grand jury referred to in the paper read was a grand jury that had nothing to do whatever with this case.

BY MR. MARGIOTTI: That is right.

(126) BY MR. MARGIOTTI:

Q. Do you know, Mr. Schroeder, who in your County would have a record—ordinarily it is the Treasurer of the county; I wouldn't assume it is that way in your County—the record of pay to the jurors?

A. At the conclusion of their service the record and vouchers for pay are submitted to the Treasurer and after he pays them I believe he sends all the papers over to the Controller of Bucks County, Mr. Howard Krupp. They should be in the possession of the Controller of the County right now.

Q. So that all of the records now would be in the hands of the Controller?

A. Yes sir.

Q. Who is he?

A. Howard Krupp.

BY JUDGE MURPHY: Did you in May—in June 1948 and May 1948 have a system when the jurors come in that

they have some kind of card that is stamped or punched to show whether they are present?

BY THE WITNESS: Yes sir, we do.

BY THE COURT: And are those cards turned in at the time they normally get paid for their attendance?

BY THE WITNESS: Yes sir.

(127) BY JUDGE MURPHY: And are they kept in the records?

BY THE WITNESS: No, we have a voucher slip and we put on the days and date. We give it to the juror. We tell them to go down to the Treasurer and get their pay.

BY MR. MARGIOTTI:

Q. What does the juror do with the card?

A. It isn't a card. It would be like a pay voucher showing the man's name, days and dates he served. That was to be signed by the Chief Clerk of the office and given to the juror to take down to the Treasurer and collect his money.

BY JUDGE MURPHY: Is it punched every day he appears?

BY THE WITNESS: We have a roster, list of attendance records. When Court opens each day his name is called and checked off. We work off that record to show days on the voucher. He goes down to the Treasurer and gets his money and we take an affidavit for every attendance on this here attendance list and we send that down to the County Treasurer.

After he makes his report he sends it up to the Controller of the County.

BY MR. MARGIOTTI:

Q. Do you have any personal knowledge—listen to the question—do you have any personal knowledge whether or not any of the jurors summoned for June 1st appeared on that date and remained for any part of the Foster-Zietz trial?

A. I don't remember that part. They just reported but I don't know whether they were in on the trial or not.

BY JUDGE MURPHY: (128) Do you have any recollection of any one of them reporting on June 1st, personal recollection that they did in fact report? No wild guesses; we want facts.

BY THE WITNESS: I would have to look at the record.

BY JUDGE MURPHY: If you know, say so; if you don't the answer is you don't know. Which is it?

BY THE WITNESS: I don't know.

BY JUDGE MURPHY: It would certainly appear, Mr. Margiotti, somewhere in that courthouse there is a record of what happened.

BY MR. MARGIOTTI: I feel certain that you are correct. I call Your Honor's attention to the fact that in the Relator's exhibit of the docket entries ——

BY JUDGE MURPHY: Exhibit number ——

BY MR. MARGIOTTI: Pardon me!

Q. Do you know whether there is a record kept in a regular docket of the Oyer and Terminer Court of Bucks County of the jurors as to the date they appear?

A. The list of jurors would be in there, sir, in the docket there showing that they were present on June 1st as summoned by the sheriff.

BY JUDGE MURPHY: What clerk's office do you work in—the Prothonotary or the Clerk of Courts?

(129) BY THE WITNESS: Clerk of the Quarter Sessions, Oyer and Terminer.

BY THE COURT: Is that the kind of an office where this record is kept?

BY THE WITNESS: That is right; yes sir.

That docket should show when they appeared for that particular time. The docket will show when the various traverse jurors appeared. It is in there in black and white.

BY MR. MARGIOTTI:

Q. I am going to show you the criminal docket for the Oyer and Terminer of Bucks County. Would you mind coming here. Is that a record kept in your office?

A. That is a record kept in our office.

Q. Will you state whether or not on Page 331 there is a reference to when the jurors which were summoned for June 1st were called—appeared?

A. Yes sir ——.

BY MR. VAN ARTSDALEN: I object to that. I think the record will speak for itself.

BY JUDGE MURPHY: The objection is sustained. The record is the best evidence. The Court will interpret the original record instead of this witness.

BY MR. MARGIOTTI:

Q. Now then, on June 1st—the first day of June was a Monday, wasn't it?

A. Yes sir; I believe it was.

Q. And on that date the Zietz-Foster trial was still going on?

A. Yes; I believe it was.

(130) Q. Now when the jurors report in your County—reported in your County at that time where would they report?

A. They report to the traverse jury room, it is situated in the basement of the courthouse, to one of the tipstaffs in charge of that particular department where they get assigned to lockers and given numbers——

Q. Given numbers——

A. Locker numbers.

Q. Was that done with the jurors that appeared there on June 1?

A. I believe it was.

BY JUDGE MURPHY: Do you know, sir? Not what you believe. Were you down there and did you have anything to do with it?

BY THE WITNESS: No sir.

BY JUDGE MURPHY: Don't say you know if you don't.

BY MR. MARGIOTTI:

Q. If you know, say so; if you don't, say so. All we want is

the facts no matter who it helps or hurts. But if you don't know, don't state you know. Do you know what happened to these jurors that appeared on June 1st?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Do you know whether or not they remained about the courtroom or were dismissed and left?

BY MR. VAN ARTSDALEN: I object.

(131) BY JUDGE MURPHY: The objection is sustained. You are assuming the first fact. Find out if he knows. He doesn't know if they appeared or if they remained.

BY MR. MARGIOTTI:

Q. Do you know if they appeared or whether they remained there?

A. I do not.

BY MR. MARGIOTTI: If the Court please, we offer in evidence from the original record, Oyer and Terminer Criminal Docket, Bucks County, under the page of 331 what appears with reference to the return of the jurors—what appears with reference to the list of jurors summoned and returned by the sheriff for the May Term, second week, under date of June 1st.

BY JUDGE MURPHY: Let me ask this question: Is there anything to show how many weeks the May Term consisted of?

BY MR. MARGIOTTI: There isn't so far, Your Honor.

BY JUDGE MURPHY: Could it be there was a list of jurors for the 24th and one for the 1st and one for the 7th?

BY MR. MARGIOTTI: No, I don't think so.

BY JUDGE MURPHY: Well, the records are the best evidence.

BY MR. MARGIOTTI: That is what I am going to do. If the Court please, the reason I identified it that way is that on this record there appears the name of Harry T. Westlake (132) that I referred to yesterday, who is on this list.

BY JUDGE MURPHY: You offer in evidence Page 331 do you?

BY MR. MARGIOTTI: 331 and 332.

BY MR. RYDER: We object on the ground that is an original record of the Court of Oyer and Terminer of Bucks County. We have no objection to the introduction of certified copies.

BY JUDGE MURPHY: The objection is overruled. The book as is will be received in evidence with reference only to the pages designated by Mr. Margiotti as well as to show the Court if it has to make an independent examination of its own, whether or not there was a term. But we think that burden should fall on counsel. If counsel meets the burden then we will permit the substitution of pages, and if they don't meet the burden, in the cause of justice we will pursue it ourselves.

BY MR. MARBIOTTI: At the same time I offer in evidence some pages, Pages 329, 330, with reference to the jurors called as of May 24th only for the purpose of showing the way these records are kept and showing that these jurors were called on that date ——

BY JUDGE MURPHY: I want to make the statement we are quite aware the burden is upon the Relator but the ultimate question is what occurred there.

So that the record will be clear, give the book an exhibit number.

BY MR. MARGIOTTI: (133) Yes.

BY JUDGE MURPHY: You haven't given it one yet. I assume it will be your "No. 10."

May we suggest to the Reporter that he add some kind of paper instead of mutilating the book in any way. Use some kind of paper just to identify it for the record as "Relator's Exhibit No. 10."

(Exhibit marked "Relator's Exhibit No. 10.")

BY JUDGE MURPHY: What about the offer he made about the other two pages?

BY MR. RYDER: What page numbers?

BY JUDGE MURPHY: Mr. Margiotti has made an offer of Pages 331, 332, 329, and 330.

BY MR. RYDER: I would make the same objection.

BY JUDGE MURPHY: You object on the ground they are the original records.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: We will receive the four pages and book in which they are included with the understanding that if it is clear to the Court at the close of the case or during the course of the case that we have the situation as that book reflects it for the May Term or whatever term was embraced the week of the Zietz-Foster trial and the Darcy trial, then we will permit certified copies or photostatic copies of those four pages and those alone.

BY MR. MARGIOTTI:

(134) Q. Mr. Schroeder, as Deputy Clerk of Courts—you are, aren't you?

A. Yes sir.

Q. As Deputy Clerk of Courts don't you have a record as a clerk in your office of the term of your Courts, when they begin and when they end, particularly your Criminal Courts, your Quarter Sessions and Oyer and Terminer?

A. Yes, we do.

Q. And that is fixed by order of the Court?

A. Yes, it is.

Q. Do you have that with you?

A. No, I do not have any here.

Q. Can you get a copy? Is there anyplace here that contains a copy of the order of the Court fixing the duration of the criminal terms?

A. The only thing would show it would be a Court calendar for the year 1948, a Court calendar showing the various terms of court, when they started.

Q. Do you have a Court calendar with you?

A. I don't have a Court calendar for 1948, no sir.

Q. For any year?

A. I changed clothes. I failed to move it from my pocket into this coat.

Q. You changed clothes?

A. That is correct.

Q. You can get the original record ——

BY JUDGE MURPHY: We understood counsel to tell the Court that as of June 1st the name of Westlake appears; is that what you said?

BY MR. MARGIOTTI: Yes sir.

BY JUDGE MURPHY: (135) June 1, No. 29 that Westlake was identified before; he was identified as No. 29, Harry T. Westlake; and No. 29 is Robert H. Clarendon.

BY MR. MARGIOTTI: I am sorry about this.

BY JUDGE MURPHY: Let's have no mistakes about it. You read what it says on Page 331 and No. 29 is not Westlake. Let's have no mistake.

BY MR. MARGIOTTI: I don't think there is any mistake. I don't think there should be any mistakes.

BY JUDGE MURPHY: There shouldn't be.

BY MR. MARGIOTTI: Here's what I have been referring to, Your Honor.

BY JUDGE MURPHY: Let's see where you find the name of Westlake in that book.

BY MR. MARGIOTTI: Here it is. Harry T. Westlake is Juror No. 118. He would have No. 118 as being summoned

but when he was called as a juror he would have another number. I think that explains it.

BY JUDGE MURPHY: Let the record note on Page 332 there is a Harry T. Westlake following No. 118.

BY MR. MARGIOTTI: Judge, on that same list, according to the Clerk's record, which is "Relator's Exhibit No. 4," appears the name of W. D. Pardoe "Sworn and seated in the box as a Juror," and on that list of the Prothonotary Pardoe is No. 16 as a juror in the Darcy (136) case. I don't know what his number would be on that list.

If the Court please, I call the Court's attention for the purposes of this record that Juror No. 1 sworn as a witness—as a juror in the Darcy case was listed as No. 16 in the Clerk's record and we find him No. 90 on Page 332 of the docket which we have just introduced in evidence and marked as "Relator's Exhibit No. 10."

BY JUDGE MURPHY: No. 1 juror is No. 16 on what exhibit?

BY MR. MARGIOTTI: It is No. 16 on "Relator's Exhibit No. 4."

BY JUDGE MURPHY: On "No. 4."

BY MR. MARGIOTTI: And No. 90 ——

BY JUDGE MURPHY: And No. 90 on Page 332 of "Exhibit No. 10."

BY MR. MARGIOTTI: That is right.

No. 2, Anna W. Bueher, is No. 20 on "Exhibit No. 4" and No. 8 on Page 331 of "Exhibit No. 10."

And Marvin D. Weidner is No. 21 on "Exhibit No. 4" and is No. 116 on Page 332 of "Exhibit No. 10."

Jessie H. Horne is No. 33 on "Exhibit No. 4" and No. 46 on Page 331 of "Exhibit No. 10."

Oliver C. Landis is No. 38 on "Exhibit No. 4" and No. 66, Page 331, of "Exhibit No. 10."

Franklin T. Fretz is No. 46 on "Exhibit No. 4" and No. 41, Page 331, of "Exhibit No. 10."

(137) Roger Mason is No. 49 on "Exhibit No. 4" and No. 70, Page 332, of "Exhibit No. 10."

Howard Price is No. 52 on "Exhibit No. 4" and No. 85, Page 332, of "Exhibit No. 10."

L. Calvin Fluck is No. 63 on "Exhibit No. 4" and No. 35, Page 331, of "Exhibit No. 10."

Elva A. Shive is No. 66 on "Exhibit No. 4" and No. 102, Page 332, of "Exhibit No. 10."

Ruth G. Bliss is No. 70 of "Exhibit No. 4" and No. 9, Page 331, of "Exhibit No. 10."

And Ann L. Reed is No. 77 on "Exhibit No. 4" and No. 91, Page 332, of "Exhibit No. 10."

Now the alternate jurors are as follows: William F. Hicky is No. 79 of "Exhibit No. 4" and No. 49, Page 331, of "Exhibit No. 10." Virginia Brillman is No. 81 of "Exhibit No. 4" and No. 14, Page 331, of "Exhibit No. 10."

BY MR. MARGIOTTI:

Q. Now I want to ask you, Mr. Schroeder, if any jurors were held over from the previous panel—would there be a record of that and how would it be kept?

A. Yes, there would be a record if any jurors were held over from the previous panel. There would be a record. We would make up another attendance record for the following week and

have the jurors all spread and their numbers and check them off in the usual way, and that would be kept.

Q. Where would you get that record?

A. That would be in the Controller's office showing payment.

Q. Showing payment?

A. Yes.

(138) Q. That would be in the same classification of other jurors where you spoke of using the Controller's office for their records?

A. Yes sir; that is right.

Q. Would you or would you not have a notation in "Relator's Exhibit No. 10" if any of the jurors were held over just like you have a notation the jurors did not answer to their names?

A. I just don't understand counsel.

Q. Come here a minute. You see this notation here?

A. Yes sir. "The following were. . ." ——

Q. Wouldn't you have also a notation, "The following jurors were held over"?

A. Well, all these that weren't excused were held over. Out of this group of jurors in this particular group these were excused and all these others were held over to be drawn on this particular jury or separated to be in other Courts for other criminal matters.

Q. I mean by "held over"—let's not have any confusion here between the meaning of a term. What I want to know is whether any of the jurors that were called for May 24 had their services extended to and beyond June 1st except the jurors that were on the Foster-Zietz trial.

BY MR. VAN ARTSDALEN: I object. The record speaks for itself.

BY MR. MARGIOTTI:

Q. If you know.

A. I don't know.

Q. If they did, where would you get that information?

A. That would be on record in the Controller's office.

Q. And you would make no notation of that in your record, "Exhibit (139) No. 10" if that were the case?

A. You refer to the docket ——

Q. Yes.

A. It wouldn't be noted in the docket. It would be noted on our Court minutes for that term of court.

Q. Do you have the Court minutes here?

A. I do not.

Q. In other words, if any jurors were held over from the previous panel to and beyond June 1 it would be in those minutes too?

A. That is correct.

Q. Now I want to clear up one thing, and that is the method by which jurors are selected in a homicide case—were selected in this homicide case ——

BY MR. VAN ARTSDALEN: I object unless this witness has personal knowledge.

BY JUDGE MURPHY: The objection is sustained on the ground we have the very record itself. If you want to contradict the record, all right. We have the voir dire here.

BY MR. MARGIOTTI: You have what?

BY JUDGE MURPHY: We have the transcript and voir dire here in both cases already in evidence.

BY MR. MARGIOTTI: What I had in mind ——

BY JUDGE MURPHY: You mean how the jury commissioners or the Court ——

BY MR. MARGIOTTI: No, I don't mean that, I mean this, whether the jurors (140) were put in a room and called in one by one and examined, and if selected, went into the jury box ——

BY JUDGE MURPHY: Were you the Clerk in either the Zietz-Foster trial or the Darcy trial; that is the courtroom Clerk?

BY THE WITNESS: No sir, I was not.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Were you in at the time the jury was selected in either trial?

A. I was not.

Q. Who was the Clerk that was in that room?

BY JUDGE MURPHY: If you know.

BY MR. MARGIOTTI:

Q. If you know.

A. Matthew L. Godshall.

Q. And was he the Clerk or a Deputy Clerk?

A. He was the Clerk of the Court of Oyer and Terminer at that time.

Q. I see. Do you know where he is now?

A. No, I don't.

Q. Where was he when you last heard of him?

A. He is a businessman in Doylestown operating a grocery and a butcher store.

Q. O.K. And was he acting as Clerk for both of those cases?

A. Yes sir.

BY MR. MARGIOTTI: All right; you may cross-examine.

(141) CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Schroeder, this is the docket which is typewritten, is that correct?

A. That is correct.

Q. Now this docket is typewritten sometime after the proceedings are actually had in court, is that also correct?

A. That is right.

Q. The docket is transcribed by one of the Clerks in your office, is that correct?

A. Yes sir.

Q. And it is transcribed from minutes taken in longhand by the particular Clerk sitting in the courtroom?

A. That is right.

Q. I believe you said you were not present in the courtroom during the Darcy trial?

A. That is right.

Q. Nor were you present in the courtroom during the Foster-Zietz trial?

A. That is right.

Q. Now, Mr. Schroeder, during 1948 the criminal terms lasted, I believe you stated yesterday, for three weeks, is that correct?

A. No, I don't believe I made that statement.

Q. All right, let me ask you this, sir: There was first a grand jury that convened during May 1948, is that correct?

A. That is right.

Q. And the week immediately following that, the week of May 24 ——

A. That is right.

Q. —— was the beginning of the Zietz-Foster trial, is that correct?

A. That is right.

(142) Q. Now then, for that particular week there were 120 jurors selected or called, is that correct?

A. That is right.

Q. Now the week of—commencing on—the Darcy trial commenced on June 7, is that correct?

A. That is right.

Q. And the jurors that were summoned to appear for that week, do you know whether any of them had been summoned to appear for the previous week or any of the previous week?

A. I don't know.

Q. Mr. Schroeder, on the docket—on Page 331 of the docket that has been offered in evidence it appears that the "List of traverse jurors summoned and returned by the sheriff to the May Term of Criminal Court A. D. 1948. (Second Week)," that does appear, does it not?

A. That is right.

Q. And the 120 names that are listed after that were the jurors that were called for the week of the trial of the Darcy case, is that right?

A. I would have to look at the Darcy ——

BY JUDGE MURPHY: What do you mean by "Second Week"?

BY MR. VAN ARTSDALEN: That is what appears in the docket.

BY JUDGE MURPHY: Read what it says.

BY MR. VAN ARTSDALEN: "Eo Die—List of traverse jurors summoned and returned by the sheriff to the May Term of Criminal Court A. D. 1948. (Second Week)."

BY MR. VAN ARTSDALEN:

(143) Q. Now, Mr. Schroeder, will you come down here again, please? On Page 332 at the end of the names of the 120 jurors there appears: "Eo Die—The second week traverse jurors having been called, all answered to their names but the following," is that correct?

A. That is correct.

Q. Mr. Schroeder, you were served with a subpoena, were you not?

A. Yes sir.

Q. And in that subpoena you were requested, I believe, only to bring—read the subpoena as to what you were requested to bring.

A. All papers filed in or comprising the complete record in the case of Commonwealth v. Harold Foster, Harry Zietz and David Darcy entered in the Court of Oyer and Terminer, Bucks County, Pennsylvania, No. 37 February Term 1948, including without limitation the transcript of testimony taken upon the trial of Zietz and the respective voir dire examination of the jurors——

Q. And did you bring all that material with you to the Court today?

A. I brought them to Court yesterday.

BY MR. VAN ARTSDALEN: That is all.

BY MR. MARGIOTTI: That is all for the present.

BY JUDGE MURPHY: There has been a request for the man, who is a Deputy in the Clerk of Courts who is now in Scranton apparently at his own expense, to get information in other offices. Now do you or don't you object?

BY MR. RYDER: I object.

BY JUDGE MURPHY: If the Commonwealth objects we will make this observation, (144) that he is the defense counsel's witness and whether he wants to volunteer here to do it for you that is between you and him.

BY MR. MARGIOTTI: We will pay him. I am only asking him to get whatever information in his own office.

BY JUDGE MURPHY: That wasn't your request yesterday.

BY MR. MARGIOTTI: That is my request today. I am not a mind reader. It developed this morning and I don't know those things.

BY JUDGE MURPHY: That is between you and Mr. Schroeder.

(Witness excused.)

REVEREND WILLIAM BABINSKY, called and sworn on behalf of the Relator, on direct and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN: If the Court please, we respectfully ask for an offer.

BY MR. RYDER: May I suggest that the record show the presence of the Relator in Court?

BY JUDGE MURPHY: We have asked that the presence of the Relator be noted and we are going to reiterate the Relator was present yesterday morning when we commenced the proceding, when we took a recess and resumed again he was present, when we took the noon recess and resumed at 2:00 o'clock he was present until we adjourned yesterday and he has been present from the time we commenced this morning, and we will now direct the Reporter at each and (145) every time the Court recesses or adjourns that when we resume the presence of the Relator, if he is present, be placed on the record and if he isn't present, the Court's attention be called to his absence.

BY MR. RYDER: Yes sir.

BY MR. MARGIOTTI:

Q. Reverend, where do you reside?

A. I reside now at Ridgewood, New Jersey.

BY JUDGE MURPHY: Just a minute! There has been a request for an offer and we take it there must be some reason

and we will ask this one question. Were you a resident of Doylestown or of Bucks County in May or June 1948?

BY THE WITNESS: I was a resident of Bucks County at the time.

BY JUDGE MURPHY: What is your reason for the request for the offer?

BY MR. VAN ARTSDALEN: We wish to ascertain whether the offer extends to conditions that may have existed subsequent to the time of the Darcy trial or whether it relates to the Darcy trial itself. As we understand the opinions—the per curiam opinion of the Court, the only question that can be involved so far as goes, is the alleged atmosphere of hysteria and prejudice prevailing at his trial, and we wish to limit the evidence to that issue.

BY JUDGE MURPHY: Your request for an offer is denied. You may develop it.

(146) BY MR. MARGIOTTI:

Q. Reverend, in December 1947 where were you living?

A. I was living at Feasterville, Pa., at the time.

Q. Do you know where the Feasterville Inn was located?

A. I do.

Q. And how far from the Feasterville Inn did you yourself live?

A. A quarter of a mile or so, roughly speaking.

Q. Did you know Mr. Kelly, who was killed?

A. I did.

Q. And what is the denomination of your church?

A. The Reformed Church of America, colloquially called The Dutch Reformed Church.

Q. And how long had you been in Feasterville?

A. I was in Feasterville from April 1945 until November 19, 1952.

Q. And where have you been since that time?

A. At Ridgewood, New Jersey.

Q. And before you went to Feasterville where did you live?

A. I lived at High Bridge, New Jersey.

Q. I see. Are you—do you have a charge in New Jersey?

A. At present I am pastor of the Old Paramus Reformed Church in Ridgewood, New Jersey.

Q. Were you in Feasterville the day of the killing?

A. I was.

Q. Will you state whether you were there at the time of the trial of Foster-Zietz and Darcy?

A. I was there at one time. I do not recall the exact day.

Q. What do you mean by being there at one time?

A. I went up one day out of curiosity.

Q. To the Court?

(147) A. Yes sir, to the Court.

Q. You were in the Court during that time?

A. In the County, yes sir.

Q. Will you state whether or not in connection with your duties as minister you became acquainted with the people in your community?

A. Yes, indeed, I did become acquainted with a great many.

Q. With a great many people?

A. Yes sir.

Q. Members of your parish or otherwise?

A. Members of my parish and many, many people in other parts of the parish. It was called the Community Reformed Church. Therefore, my relationships were with the community as a whole.

Q. Will you state whether or not you know—strike that. State whether or not you engaged in conversations with people

in Bucks County concerning the Feasterville robberies and killing from the day it occurred until the Darcy trial—until and during the Darcy trial.

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: Were there two robberies or was the one in the other town?

BY MR. MARGIOTTI: What was that?

BY JUDGE MURPHY: I am wondering about the proof. The first robbery was at Feasterville; the other a half hour later was where—in Feasterville?

BY MR. MARGIOTTI: (148) Not Feasterville.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY JUDGE MURPHY: That can be answered yes or no.

BY MR. MARGIOTTI: Following His Honor's suggestion answer it yes or no. That was the intent anyhow.

BY ~~THE WITNESS~~:

A. Yes, I did engage in conversations.

BY MR. MARGIOTTI:

Q. In those conversations did persons express themselves concerning the defendants, particularly Darcy?

A. Yes, they did express themselves.

Q. And will you state whether or not these expressions were few and far between or whether there were many of them?

A. I would say that conversations relating to this whole episode were going on all the time, so far as I could ascertain, from the time of the commission of the deed until and after the trial. It was a constant sort of thing, a very lively topic of conversation.

Q. And from these conversations that you had with various persons will you state whether you are in a position to tell the Court what the feeling was, if any, for or against Darcy at the time of his trial?

A. Well, I think the people —.

BY MR. VAN ARTSDALEN: I object. That contemplates a yes or no answer.

BY JUDGE MURPHY: (149) We will let him answer and explain.

BY THE WITNESS:

A. Repeat the question, please.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY JUDGE MURPHY: First answer that yes or no.

BY THE WITNESS:

A. Yes, I am in a position. I think so.

BY MR. MARGIOTTI:

Q. What was that feeling at the time of Darcy's trial?

BY JUDGE MURPHY: When did Darcy's trial occur?

BY THE WITNESS: Darcy's trial occurred the week of June 7.

BY MR. MARGIOTTI:

Q. Answer the question now.
A. Now my answer, of course ——
Q. Answer the question and explain it all you please.
A. I would say the prevailing ——

BY MR. VAN ARTSDALEN: I object for the purpose of the record and object to all other questions calling for an opinion of the witness as to the feeling of the people in the community.

BY JUDGE MURPHY: We will permit thorough cross-examination of this witness.

BY THE WITNESS:

A. The prevailing sentiment of the community, as far as the defendants (150) are concerned, was a sentiment against them. Now that is a very general statement. That could be amplified.

BY JUDGE MURPHY: Go ahead. If you can amplify it, do so.

BY THE WITNESS: Well, I engaged in many, many con-

versations on this subject. People talked to me very, very readily because I knew the Kelly family and was very active in the community and I was stopped innumerable times and talked at gas stations, grocery stores, post offices, on the street with many, many people, and I gathered from my conversations with these people that they were very much biased in favor of condemning the defendants. Now the reason I say that is because I recall very vividly some conversations—I can not point to direct people, I talked to so many, but I can recall some of the very vivid impressions upon my mind. I remember that everybody was saying—now I say everybody was saying, people to whom I talked—everybody was saying that "The boys don't need a trial; the boys should be condemned to death." I remember them saying "They shouldn't have any mercy." I remember all kinds of rough statements of that kind before, during and after the trial. Now I think that would amplify what I meant when I said there was this feeling that went beyond the bounds of indignation.

BY MR. MARGIOTTI:

Q. Reverend, did you have anything to do with Mr. Kelly, the deceased?

A. I was the clergyman who officiated at his burial.

Q. You officiated at Mr. Kelly's burial?

A. Yes sir.

Q. And from the opinion expressed by the public against Darcy (151) and the other defendants, will you state whether or not in your opinion the defendant could get a fair and impartial trial in Bucks County unaffected by the prejudice which you have related?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained. That is for the Court.

BY MR. MARGIOTTI: All right, Your Honor. I wanted to ask it in order to get it on the record.

BY JUDGE MURPHY: It has been asked

BY MR. MARGIOTTI:

Q. Now do you recall any other—were there any expressions of threats or violence?

A. Well, there were no expressions of threats or violence in the sense that anybody was going to organize against the defendants, no, but there were the expressions of people saying "I think they ought to be hanged," "I think they ought to be shot," or "I think they ought to be stamped out like bugs." I heard that.

BY JUDGE MURPHY: What "like bugs"?

BY THE WITNESS: "Stamped out like bugs."

BY MR. MARGIOTTI:

Q. How was—could you tell us whether or not you observed any change in the degree of feeling after the Foster-Zietz trial and just before the Darcy trial, or not?

A. I can not answer that conscientiously. I can not particularize the answer to that extent.

(152) BY MR. MARGIOTTI: You may cross-examine.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Reverend Babinsky, you say you came to Bucks County in April 1945, is that correct?

A. Yes sir.

BY JUDGE MURPHY: Just one minute! It is time for the usual ten-minute recess. It is 28 minutes after.

(Recess.)

(Court resumes after the recess with all parties including the Relator, David Darcy, present in Court.)

REVEREND WILLIAM BABINSKY, recalled.

CROSS-EXAMINATION (Continued).

BY MR. VAN ARTSDALEN: I move to strike out the testimony of the witness concerning what other people may have said to the witness about the case of Zietz-Foster and Darcy.

BY JUDGE MURPHY: We will let it stand subject to the objection.

BY MR. VAN ARTSDALEN: Thank you, Your Honor.

Q. Reverend, where is Feasterville in relation to Doylestown?

A. I would say it is ——

BY JUDGE MURPHY: I may say for the record it would appear to the Court and certainly if this were any trial in which the Court presided, in its twenty-five years of practice, if this came out de novo we would not allow it, but in view of this Mandate—just what (153) the pertinency of it is I don't know—but in order to comply with the mandate we will place it in the record subject to the objection.

BY THE WITNESS:

A. Well, roughly, about fifteen miles from Doylestown.

BY MR. VAN ARTSDALEN:

Q. And Doylestown is the county seat of Bucks County, is that correct, Reverend?

A. Yes sir.

Q. Now during 1948 do you know what the population of Feasterville was?

A. I did not know accurately the population of Feasterville at that time. It was a growing community.

Q. Of course. Could you give us an approximate idea of the population of Feasterville in 1948, in May and June 1948?

A. We worked on a township basis there so that I know there were about 1,000 to 1,200 voters registered there during that period.

Q. That is in the township itself?

A. In the township. Now in Feasterville I would judge the population might have been 1,500.

Q. And do you know what the population of the County of Bucks was, or do you have any idea?

A. None whatever.

Q. What was the total number of your parishioners, if I may use the expression?

A. At the time 1948 ——

Q. May and June 1948.

A. You don't mean by that the membership of the church necessarily because parishioners would embrace a lot more than that.

Q. What about the membership of your church itself?

(154) A. It might have been at that time roughly perhaps 150, roughly.

Q. And how many regularly attended church, can you give us any idea at that time?

A. At that time it would be very difficult for me to remember. I would say roughly perhaps 100 per Sunday.

Q. Of course, that included men, women and children you are referring to?

A. No, that would not include Sunday School folks. That would include just the Sunday morning worship service.

Q. All right, sir. Now this offense occurred in Feasterville, did it not?

A. It did.

Q. It involved a holdup in one of the taverns there in Feasterville, is that correct?

A. Yes sir.

Q. You lived there from 1945 April until some time in 1952?

A. Toward the end of November 1952.

Q. Now during that period of time there were no other murders occurred in Feasterville?

A. To my knowledge, I do not recall any.

Q. Now, Reverend, you have mentioned that there was a great deal of conversation that took place concerning this case, is that correct?

A. That is correct.

Q. And when did those conversations first start?

A. They started the next morning.

Q. After the offense?

A. After the offense occurred.

Q. Now, did they—did you hear more conversation or less conversation as the time of the trial approached?

(155) A. Perhaps there may have been a little lull on the conversation while things were quiet after the offense. Then as the time of the trial approached I would say conversation mounted in intensity.

Q. And do you know how long it was from the time of his offense up until the time of trial of Darcy?

A. Yes, roughly, five months.

Q. This offense occurred just a few days before Christmas 1947, didn't it?

A. Yes sir.

Q. Now the persons with whom you talked about this, I assume, were people that you knew personally, is that correct?

A. Many of them would be; many of them would not be.

Q. Well, were they strangers to you?

A. In a group let's say, meeting at some casual place such as a gas station or post office there could be people there involved in conversation whom I would not know.

Q. What gas station and what post office are you referring to?

A. Feasterville.

Q. Only in Feasterville?

A. Yes sir.

Q. Now, you do not know, do you, whether any of those persons ever spoke to any of the members of the jury in the Darcy trial?

A. I do not know.

Q. You do not know, do you, whether any of those persons who you heard speak ever attended the Darcy trial?

A. I believe they did.

Q. You do not know that, however, do you?

A. I know some of them that did, yes sir.

Q. How do you know that, by what they told you?

(156) A. On one occasion I remember talking with people who went up there and heard parts of the trial.

Q. All right, sir. Now, you did not yourself go to any of the Darcy trial, did you?

A. Not the Darcy trial, no sir.

Q. Now, you did not yourself go to any of the Darcy trial so that you do not know of your own knowledge any one that attended any of the sessions of the Darcy trial, is that correct, sir?

A. I think that is correct.

Q. And any knowledge that you have concerning the Darcy trial was purely what you have heard other people say, is that correct, as to what occurred at the trial itself?

A. That is correct.

Q. You weren't in Doylestown during the Darcy trial?

A. Not during the Darcy trial.

Q. So that you don't know of any occurrence that may have occurred in Doylestown, in the courthouse or around the courthouse, is that correct?

A. Except through hearsay.

Q. Except through hearsay and ——

A. Including news bulletins and so forth, of course.

BY MR. MARGIOTTI: What?

BY THE WITNESS: Including news bulletins and so forth, of course.

BY MR. VAN ARTSDALEN:

Q. Now, Reverend, you mentioned that one person that you knew of apparently had attended a session of the trial, who was that person, please?

A. Your Honor, may I ask you a question?

(157) BY JUDGE MURPHY: What is your question?

BY THE WITNESS: I believe I was called as a witness to testify to a prevailing climate of opinion.

BY JUDGE MURPHY: You have made statements under oath and you are being cross-examined about it. Answer the question.

BY THE WITNESS: May I have the question repeated?

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY THE WITNESS:

A. Do you mean the Darcy trial or just the trials in general?

BY MR. VAN ARTSDALEN:

Q. The Darcy trial was the trial that I intended to refer to.

A. I don't believe that I mentioned that I knew any person that attended the Darcy trial. I used the word "trial" in general, Foster-Zietz, Darcy.

Q. Then you do not know any person that attended the Darcy trial, is that correct, sir?

A. Now I believe that question is very difficult for this reason. I know people that attended these trials and whether they attended all of them or parts of them or not I can't particularize the question to that detail.

Q. Well, may we go back then just a moment?

A. Yes sir, sure.

Q. You mentioned that you had conversations with certain people prior to the trial?

A. Yes sir.

(158) Q. Now then, do you know or where you informed by any of those persons that spoke to you prior to the trial that they attended any of the Darcy trial?

BY JUDGE MURPHY: Do you understand the question?

BY THE WITNESS: Just to see whether I understood your question clearly, you want to know whether I know anyone in particular who attended the Darcy trial, that is to whom I have spoken ——

BY MR. VAN ARTSDALEN:

Q. That is to whom you spoke about the case prior to the trial.

A. I could not say for certain that any one individual attended the Darcy trial. I can give you the names of people I know who attended the trials.

Q. All right, sir. I take it then these people that talked to you prior to the trial you do not know whether any of them attended the trial, the Darcy trial?

A. I do not know.

Q. All right. Now then, you mentioned that there was a great deal of conversation about these cases. Was there any differentiation between the cases of Foster and Zietz and Darcy in the minds of the people?

A. I think there was not.

Q. And that—incidentally, there was another man involved in this crime, was there not?

A. Yes sir, there was.

Q. Do you remember his name?

A. Yes, his name was Capone.

Q. Now, can you tell us the names of any of the persons to

whom you talked prior to the trial? You mentioned previously one person said "They ought to be stamped out like bugs."

(159) A. I said I remember remarks like that. I remember that very vividly. It made a terrific impression on my mind. Which one of the people I talked made that statement, I couldn't truthfully remember.

Q. Can you recall when it was said?

A. Can I recall when it was said? I could not. It was sometime during the period.

Q. You say it was sometime during the period, do you know whether it was before or after the Darcy trial?

A. It was before.

Q. But you don't know how long before?

A. No, it may have been March; it may have been in April; it may have been in January or February.

Q. It may have been very shortly after the offense occurred, is that correct?

A. It is possible.

Q. Is it possible that it could have been in December 1947?

A. At that time, to the best of my remembrance, people were not talking about the trial and what should be done with these boys. To the best of my remembrance, they were just speaking in terms of the awfulness of it and so forth.

Q. In other words, there was a general feeling directed against the type of the crime rather than a personal feeling against any of these defendents?

A. I don't believe I could unqualifiedly agree with that statement.

Q. Can you unqualifiedly disagree with it?

A. I believe so, yes.

Q. Now then, will you explain?

A. Why, because in conversations with the people the names of the accused defendants would come up again and again

They would (160) say they thought, "There should be no mercy," "There should be no help," and so on, "They ought to be given the chair," and what have you, some for the extreme sentence, some for the limit sentence. I remember they made a deep impression on my mind.

Q. Can you give the names of any of those persons that gave you any of those statements at all?

A. Yes, I can.

Q. Will you give one?

A. I can. I can give you several of them. There was Stewart Reibman, commonly called "Reib."

Q. Where does he live?

A. Feasterville, Bucks County.

Q. When did you have a conversation with him?

A. Many, many times.

Q. When was the first time?

A. I believe I talked with him the day after the offense.

Q. Do you recall what he said about it?

A. I do not.

Q. Do you recall particularly anything he said to you in any conversation you had with him?

A. I do not know any of his particular words. I remember I engaged in conversation with him concerning this, and several others.

Q. And you don't recall any particular words he ever said to you about the offense, is that correct?

A. No, I can not.

Q. Can you give us the name of any other person with whom you had a conversation?

A. Morris Ferguson.

Q. Where does he live?

A. Feasterville.

(161) Q. What is his occupation?

A. He is a salesman.

Q. When did you have any conversations with him?

A. Now there again I can't give my conversations with him.

Q. Did you have conversations with him after the Darcy trial?

A. Yes.

Q. Did you have many with him after the trial?

A. Yes, indeed; he was a good friend of mine.

Q. Are you able to say—can you tell us of any particular conversation you had with that gentleman?

A. With Mr. Ferguson ——.

Q. Yes sir.

A. Not particularly just to pick out words. He was the man I went up to the trial with that I don't remember which trial it was even.

Q. Just a moment ago you said it was the Foster-Zietz trial. Do I understand you are not correct?

A. It was the Foster-Zietz trial.

Q. You are sure of that?

A. Yes sir, near the end of that trial.

Q. Any others you had a conversation with?

A. Earl Patterson.

Q. Where does he live, sir?

A. Feasterville.

Q. And do you know when you had a conversation with him?

A. I believe he was one of the ones I talked with immediately the day after it occurred.

Q. The day after it occurred ——

A. And several times subsequent thereto.

Q. Do you know when was the last time you talked to him about the case?

A. I do not.

(162) Q. And what, if anything, did he say about the offense?

A. I do not recall the particular words. I remember the

general things that were said because they made an impression upon my mind.

Q. Can you remember specific words that were said to you by anyone?

A. I can not. I can not conscientiously say I remember this man saying this and that man saying that.

Q. Can you recall the names of any other persons with whom you talked to about this case? When I say "this case" I am referring to both the Darcy and Zietz-Foster case.

A. Yes. I had very general conversations with so many men I could probably just say—bring in 100 names and I would say I talked with all of them.

Q. Now, Reverend, you have told us you did go to the trial one of the days of the Foster-Zietz trial; do you remember what day that was?

A. I do not.

Q. Was it during the calling of the jury?

A. It was near the close of the trial.

Q. It was near the close of the trial?

A. Right.

Q. Now, was it a day session or an evening session?

A. It was a day session.

Q. Do you remember what Judge was sitting on that trial?

A. I can not conscientiously say I remember.

Q. Why did you go up to the trial?

A. To see what was going on.

Q. Out of curiosity, is that correct?

A. Yes sir.

Q. You had no direct connection with the trial?

A. I did not.

(163) Q. Now then—was it a morning session or an afternoon session?

A. Morning and afternoon of that particular day.

Q. In other words, you went to both sessions?

A. Yes sir.

Q. Were you there when Court opened in the morning?

A. No sir. I was not. I remember that.

Q. Do you remember about what time you came into the trial?

A. Well, to fix the time of day——

Q. Approximately.

A. I would say 10:30-ish.

Q. Were there people standing outside the courthouse?

A. Yes, there were; sure.

Q. How many?

A. A guess you would like——

Q. Your best estimate, sir.

A. Oh, I think there may have been twenty-five or thirty people.

Q. Did you come directly into the courtroom?

A. Yes.

Q. That was outside the courthouse, is that correct?

A. Yes, it was.

Q. Did you hear any of them say anything about the case as you came in?

A. No, we didn't pause long enough.

Q. What about in the hall to the main courtroom?

A. As I remember it, we came into Doylestown, parked our car and walked into the courtroom.

Q. Were there any large crowds outside the courtroom?

A. "Large crowd" is a very general term. There were a number of people around as there are on such occasions.

Q. Now when you came into the courtroom was the courtroom filled?

(164) A. To the best of my remembrance, it was.

Q. That was in the Zietz-Foster trial?

A. Yes sir.

Q. Were you able to find a seat?

A. Yes; I remember that.

Q. Now during the day that you were there - we don't want to go into this too much—was there any commotion at all?

A. I don't remember any.

Q. Was there any disturbance?

A. I don't remember any.

Q. Was there any outburst?

A. I don't remember any.

Q. Did anyone get up and shout and make any disturbance of any sort?

A. So far as I can remember, no.

Q. Do you remember how the jury were brought in and taken out?

A. I do not.

Q. Did you see the jury come through the main courtroom or did they go out a side door on each occasion, if you recall?

A. I don't recall; I do not.

Q. In other words, during the day you were there at the trial except for the fact there were some spectators and the courtroom was filled, was there anything unusual about the trial of that case that you observed?

A. It was a trial. I have been in court before and I had seen them for Bucks County. I think there were more people there than usual in the courtroom and around the building.

Q. But with everything quiet and orderly?

A. I would say so, so far as I recall.

BY MR. VAN ARTSDALEN: (165) All right, that is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. In talking to these people in and about Feasterville would you say the people you talked to were from Feasterville or from some distance from Feasterville?

A. Most of the people I talked with were people from Feasterville or from the immediate environs of Feasterville.

Q. What would you call the immediate environs of Feasterville—within a radius of how many miles?

A. A mile or two or three; Langhorne, Southampton.

Q. Right in that area of Feasterville?

A. Yes.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

(Exhibit marked "Relator's Exhibit No. 11.")

BY MR. MARGIOTTI: I would like to offer—by agreement of the parties we have agreed to introduce, subject to acceptance by the Court, "Relator's Exhibit No. 11," which is a map of Bucks County with a scale marked thereon, and it is apparently a map of the Commonwealth of Pennsylvania from the Department of Highways, only for the purposes of helping the Court in locating different sections of the County.

BY JUDGE MURPHY: Is there any objection?

BY MR. RYDER: We have no objection.

BY JUDGE MURPHY: (166) It will be received.

MR. G. COLE FARRIER, called and affirmed on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Farrier, where do you reside?

A. Byberry Road and Depue Street, Summerton, Philadelphia, Pa.

Q. What is your business or profession?

A. I am an attorney-at-law.

Q. You practice law in Philadelphia?

A. I do, yes.

Q. Admitted to the various courts of our State including the appellate courts?

A. I am, and also the Supreme Court of the United States.

Q. I want you to state whether you have held any public position in the City of Philadelphia.

A. For many years I was Chief Librarian and research man for the Supreme Court of Pennsylvania and then I went into the City Solicitor's office on January 15, 1920, and I resigned from that office on April 1, 1952, after having served as Senior City Solicitor for a greater part of the time.

Q. And, Mr. Farrier, are you acquainted with Bucks County?

A. I have lived in Summerton, which is right on the boundary line of Bucks County across the County line from Feasterville, since the 1st of August 1930 and prior to that time I had lived at 96 Bustleton Avenue in Bustleton.

Q. The last place you mentioned, is that in Bucks County or Philadelphia?

A. Busfleton is in Philadelphia County about three miles south (167) on Bustleton Avenue in Bustleton.

Q. In the practice of your profession or for any other purpose did you happen to become acquainted in Bucks County?

A. Yes, all my life practically I have been riding in and out on the Summerton train and about two-thirds of the people that ride on that train come from Bucks County. It is the end of the line for them. It is the nearest, quickest transportation into the city, and course I have—one of my sons married the daughter of a contractor who lives about one-fourth of a mile from this Feasterville tavern and my wife has many social connections up through there, and the result was—except for this bunch of outsiders that come in in the last two or three years—I was pretty well acquainted with whole neighborhood, and I live right on the boundary line. My bedroom window looks into Bucks County.

Q. Do you spend much time looking out the window into Bucks County?

BY JUDGE MURUHY: No; we will take long enough as it is.

BY MR. MARGIOTTI: I withdraw that.

Q. Will you state, Mr. Farrier, whether you had anything to do with the defense of any of the boys involved in the Feasterville killing?

A. I was counsel for the parents of Harry Zietz before the thing happened. They came in to my office and retained me immediately after it happened, and not being a member of the Bucks County Bar I took my matter up with my correspondent in Bucks County, Mr. Rubin, and arranged with Mr. Rubin to handle the physical trial of the case of Harry Zietz in Bucks County.

Q. Did you participate in the trial of Harry Zietz in Bucks County?

(168) A. I did not.

Q. Will you state whether or not you participated in the preparation of that trial?

A. I did. I felt it was best for the client to have a local attorney rather than an outside attorney to represent him in such an important case.

Q. Did you enter an appearance in behalf of the client in Bucks County?

A. I did not.

Q. What you did was to do legal work for him, then you turned over the results of your findings to Mr. Rubin?

A. In fairness to Mr. Rubin I would say I worked with him and that he did not merely fire the bullets that I prepared. We worked together.

Q. Yes. And in doing so will you state when you began—strike that. In doing so did that get you into Bucks County?

A. I am in Bucks County almost every day anyway.

Q. All right. Did your investigation take you into Bucks County?

A. Oh yes, surely.

Q. And in what particular location in Bucks County?

A. Well, up at the Feasterville tavern where there are three roads splitting there at the end of the Bristol Pike, and in among the people around through Feasterville that I know and at the garage where I have my car repaired, at the gas station where I buy my gas and have my tires changed. I did most of my business of a local character up through that area.

Q. Did you have occasion to do any other investigatory work in connection with the preparation of the trial of Zietz in Bucks County?

(169) A. Unquestionably, yes, I did.

Q. And did that take you, this other work, take you to other sections of the County?

A. Well, to Doylestown.

Q. To Doylestown. Did it take you anyplace else other than Doylestown?

A. Not for the purposes of the case, no sir.

Q. Now in connection with your work did you come in contact with the people of Bucks County?

A. I did.

Q. Did you hear them—did you engage them in conversation, or did they engage you in conversation, or both?

A. As soon as they found out I represented Zietz they engaged me in conversation and not politely either.

Q. Did you engage in many conversations or just a few?

BY MR. VAN ARTSDALEN: I object unless the time is specified.

BY MR. MARGIOTTI: I am taking before the trial.

BY JUDGE MURPHY: He wasn't retained until after the murder occurred.

BY MR. MARGIOTTI: And after the trial.

BY JUDGE MURPHY: At any rate, after the murder.

BY MR. MARGIOTTI:

Q. Go ahead.

A. I made it my business, as I do in most cases, especially in important ones, to get a personal knowledge of what happened at (170) the tavern and what happened to the people in the tavern, and I talked to a number of those people. Some of the people who were robbed were my clients. I went to see them and talked to them about it.

Q. You mean some customers who were involved in the Feasterville tavern?

A. Some customers who were involved in the Feasterville tavern were clients of mine in other legal matters and I went to see them and talked to them about it.

Q. Did you locate those people not connected with the Feasterville Inn, not connected with the owners, or customers?

A. Yes sir. You see, Mr. Margiotti, we ride along on a train —

BY JUDGE MURPHY: No, we will get along. You are a lawyer. The Court himself was a witness and he knows how lawyers are. Answer the questions.

BY THE WITNESS: Yes sir.

BY MR. MARGIOTTI:

Q. Will you state whether or not you talked to people going back and forth to work?

A. Yes, I did, on the train and at the railroad station while we were waiting for the train, coming home on the train.

Q. Did you talk to them at any other public place?

A. At the garage where I have my car repaired, at the gas station where I buy my gas and have my tires changed.

Q. Was that in Bucks County?

A. Yes sir, Bucks County, Feasterville.

Q. In these conversations did these people express themselves concerning their feeling against the defendants at the time of the trial, particularly at the time of the Darcy trial?

(171) BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it subject to the objection and say that normally it would be hearsay, that the testimony doesn't qualify in any manner with the requirements, but we have here a novel situation where we have been

directed by Mandate to find out what the sentiment was of the people of Bucks County, in that area. That is apparently where we are right now, and we will take it subject to the objection. Bucks County and thereabouts.

BY MR. MARGIOTTI: Read my question, Mr. Butler.

(Question read by the Reporter.)

BY THE WITNESS:

A. Frankly, I will have to qualify my answer to that because ——

BY MR. MARGIOTTI:

Q. First answer the question yes or no and I will follow it up with something.

A. Yes, they did. I will have to explain that I can't recall the day, hour and minute that it was said to me, or even the week, but it occurred from time all through from the day after the murder until after Darcy's trial was finished and so on infinitum.

Q. Does that feeling still exist?

A. I don't know whether it is material. It certainly does.

Q. Let me ask you: What—from your conversations with these people what was the sentiment of the people against the defendant Darcy—and during the trial?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: (172) We will take it subject to the objection.

BY THE WITNESS:

A. Did you ask me for my opinion?

BY MR. MARGIOTTI:

Q. What was the sentiment of the people from the conversations they had with you?

A. From recent developments the public ——

BY JUDGE MURPHY: No, you are now back in 1948, in June—May.

BY THE WITNESS: I was going to say I don't think I giotti seems to think. I can only tell you what people said to have such a good ability to analyze public opinion as Mr. Marme, what they did to me and what they said to each other. I am not going to give you my opinion as to what the sentiment was because I don't think I am capable of forming an opinion.

BY JUDGE MURPHY: You can give the facts upon which you formed an opinion or assumption.

BY THE WITNESS: The very treatment or conversations I heard, their statements made to me, "I was a louse for taking his case," for one thing. That is not so of everybody that talked to me, but that remark was made to me, and I can give you the names of the people that made many of these remarks. Furthermore, "That these kids should burn," and "The only thing should happen to them was they should burn." That was said to me over and over again. That was said to my daughter, at a dinner party two weeks ago

BY JUDGE MURPHY: (173) Strike that out—your daughter talking at a dinner party.

BY THE WITNESS: with respect to these boys.

BY MR. MARGIOTTI:

Q. Prior to the trial.

A. This is all prior to the trial except what the Judge has stricken out.

Q. Prior to the trial. We will have a little difficulty but stick to that, please.

A. Prior to the trial the general conversation, and it would happen everytime I got gas or got my car fixed, up through there even when I would stop in to buy a loaf of bread was "Are you still taking care of those kids?" "Are you keeping those murderers out?" "When are they going to burn?" "How long do you think you can keep them away from the hot spot?" Those were the kind of remarks made to me from time to time. Some of them, I will agree with you, were made facetiously because they liked to ride me. They knew me. I am one of the community. I am not expelled because of what happened. I am simply reprobated. But those things were said to me all during this time, and I haven't any doubt if the District Attorney wants to know names I will have them for him ——

Q. You wait until he examines you. If he wants to know names, tell him. On the conversations you had on that train that ends there and goes down to Philadelphia ——

A. I didn't understand the question.

Q. Conversations with the people on the train; what happened on the train?

A. The very opinion and expression of opinion was not repeated over and over again, but almost everybody when I rode the train (174) did tell me at some time or another between the murder and the trial "I think your boy should burn." "I think they all should burn." That seemed to be the general impression of the people that had nothing to do with the actual occurrence.

Q. Were those people from Bucks County?

A. Those that I am speaking of, some of them were from Bucks County or in the immediate vicinity of the County line.

Q. Some of them could have been from Philadelphia?

A. Well, they may have lived a stone's throw on this side of the Bucks County line in Philadelphia.

Q. May I ask you this question—please don't answer this, there may be an objection—if there is, don't answer until there is a granting by the Court; you are to be guided thereby: From the expressions heard by you, will you state whether or not, in your opinion, the defendant Darcy could have at the time of his trial obtained a fair and impartial trial at the hands of the citizens of Bucks County? Don't answer that, please ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: There is a question addressed to one of defense counsel. It seems the question is what is before this Court and this Court must make the judgment. We will listen to facts but we don't think this man's opinion is proper evidence particularly in view of his previous testimony as well as the law. The objection is sustained.

BY MR. MARGIOTTI:

Q. Now that you have testified, will you state whether or not from what you heard—strike that. Did you read the newspapers?

A. I did.

Q. Will you state whether you read the newspapers published in (175) Bucks County?

A. I think I saw during all this period about one or two copies of some newspaper published in Doylestown and the Hatboro Spirit, which they have up at our drugstore on the corner.

Q. Did you read the Philadelphia papers?
A. Every day.
Q. Did they carry stories about this case?
A. They did.
Q. That is the metropolitan papers?
A. I don't know what you mean ——
Q. The Inquirer, the Bulletin ——
A. The Inquirer, News and Bulletin.
Q. Will you state whether or not you listened to the radio?
A. Radio ——
Q. Yes.
A. Yes, I did.
Q. Did you hear any news comment on the radio?
A. I did, yes.
Q. Now from everything you read, heard and saw, from these various conversations that you say you heard, I want you to state now from that whether you yourself formed an opinion as to the sentiment in Bucks County concerning Mr. Darcy. Don't answer that.

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI: I will ask you another question ——

(176) BY JUDGE MURPHY: We are sustaining this objection in view of this witness's previous testimony and we feel that if this is the measure of public opinion, in order to get a fair and honest appraisal we would have to have experts in public opinion analysis and have—how many thousand people live in that County?

BY MR. VAN ARTSDALEN: We don't know but it is over 150,000.

BY JUDGE MURPHY: Over 150,000 people.

BY MR. MARGIOTTI: That is because of the steel mills there.

BY JUDGE MURPHY: I don't know anything about steel mills. The objection is sustained.

BY MR. MARGIOTTI:

Q. From what you have heard, read or saw, will you state whether you are now in a position to tell the Court was it your opinion this defendant could obtain a fair and impartial trial as is contemplated by the Constitution of the United States in Bucks County?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: Judge Watson feels we should sustain the objection. I feel we shouldn't sustain the objection and go into the question. I am going to sustain the objection because I think we are far afield. I believe it is the duty of counsel to present facts instead of the gentleman's opinion after reading an article in the Hatboro Spirit on one occasion. The objection is sustained.

(177) BY MR. MARGIOTTI: You may cross-examine.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Farrier, you took an affirmation here rather than an oath, is that right?

A. I did.

Q. And I take it that you are a member of the Society of Friends?

A. Society of Friends, Jenkintown.

Q. You yourself have a deep personal and moral conscientious objection to capital punishment, do you not?

A. I have.

Q. Do you still represent Harry Zietz?

A. I never represented Harry Zietz as Harry Zietz. I represented his mother and father and I simply pro forma represented them in appealing his case to the Supreme Court of Pennsylvania.

Q. But you did appear in the Supreme Court of Pennsylvania in the case of Harry Zietz?

A. I did appear in the Supreme Court of Pennsylvania in the case of Harry Zietz, yes.

Q. Mr. Farrier, on the appeal to the Supreme Court of Pennsylvania you made no claim of any hysteria in the community, did you; that issue was not raised there?

A. I did not raise it.

Q. As to the defendant whom you represented, Harry Zietz?

A. I did not.

Q. Now, Mr. Farrier, during the trial of Harry Zietz and Foster you were not present in Doylestown, were you?

A. I was not present in Doylestown, no.

Q. Were you present in Doylestown during any of the period of that (178) week?

A. I was not.

Q. All right, now then during the week of the trial of David Darcy were you present in Doylestown at any time during that week?

A. I was not.

Q. So that you have no personal knowledge of anything that may have occurred in Doylestown during the weeks of the trials of both of Darcy and also of Zietz and Foster?

A. Only from the record.

Q. Only from the record?

A. Only from the record as made there.

BY MR. MARGIOTTI: What was that answer?

BY JUDGE MURPHY: Read the answer, Mr. Reporter.

(Answer read by the Reporter.)

BY JUDGE MURPHY: "Only from the record" I assume he means the transcript.

Well, it is now 12:30. We will recess until 2:00 o'clock.

(Recess.)

(179) (Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

MR. G. COLE FARRIER, recalled.

BY JUDGE MURPHY: Now then, we are in open Court. We want to state that we will be glad to hear from the witness on the stand any facts he may be able to offer which will aid this Court in coming to the conclusion as directed by the Mandate of the Circuit Court.

BY MR. MARGIOTTI: Mr. Farrier, have you stated—were you cross-examining?

BY MR. VAN ARTSDALEN: I was.

BY MR. MARGIOTTI: I withdraw that question.

BY JUDGE MURPHY: No. You have a right to continue on cross-examination.

CROSS-EXAMINATION (Continued).

BY MR. VAN ARTSDALEN:

Q. Mr. Farrier, you stated, I think, on this train you rode back and forth to Philadelphia approximately two-thirds were from Bucks County?

A. Those that got on at Summerton Station.

Q. Those that got on at Summerton Station?

A. Yes. Oh, naturally, people from Langhorne and stations down the line. I only knew a few of them. Our little group was a group from Summerton Station.

Q. Now, when did you first represent Harry Zietz after this offense occurred?

A. I never entered a formal legal appearance for him until I (180) entered it in the Supreme Court on the occasion of my entering an appeal from the decision of the Common Pleas Court of Quarter Sessions Court of Bucks County.

Q. You have stated you did make an investigation yourself into the facts surrounding the offense shortly after it occurred, is that correct?

A. I was consulted by his mother and father immediately and on their behalf I immediately started to prepare myself to do something for this boy, if I could, to save him from the chair, if possible.

Q. It was in pursuance of your investigation a great many of these conversations took place, was it not?

A. On some occasions, perhaps one-half dozen, I went and made specific inquiries about the case. The other just came up ad lib.

Q. Did you tell those people of your interest in the case?

A. I had to. I couldn't ask questions about private affairs unless I had an interest to be served.

Q. So that you did tell them of an interest by you?

A. About five or six cases out of perhaps fifty such cases.

Q. Would you say it became generally known around the community of Feasterville you were interested in the case?

A. Among those I know.

Q. Weren't a lot of the conversations about the case directed to you because of your interest in the case?

A. Oh yes; surely.

Q. And you stated that some of the conversations that took place and some statements made to you were made facetiously —was that the term you used?

A. Those were from my friends with whom I have fraternal connections.

(181) BY MR. MARGIOTTI: What kind of connections?

BY JUDGE MURPHY: Fraternal.

BY MR. VAN ARTSDALEN:

Q. Did you talk to complete strangers about this case?

A. No, but they talked to me. I didn't even know their names.

Q. On what occasion?

A. Oh, going in on the train from time to time, waiting at the station or at the gas station, the garage where I was having my car fixed by McBride in Feasterville.

Mr. G. Cole Farrier Cross

Q. At any time in Feasterville were there any mass gatherings or protests of any sort about this case?

A. I can't say that because I never attended any or did any come to my attention.

Q. So that none of them came to your knowledge, is that correct?

A. That is correct.

Q. You never observed any mass demonstration of any sort, did you, either in Feasterville or elsewhere in the County of Bucks concerning this case?

A. No. At the approach they ganged up on me. When there would be four or five engaged they would gang up on me, sometimes in a friendly way and sometimes in a hostile way.

Q. Were you ever threatened with any physical violence, you personally?

A. No. Since you have asked it, I was told "It wouldn't do me any good as a lawyer to take this case." I forget who said it. It was just suggested in innuendo in some of the conversations.

(182) Q. That was told to you by a friend, I take it?

A. Certainly not.

Q. You mean that was told to you by a stranger?

A. Why, somebody stated—he said "Cole, it won't do you any good as a lawyer to take this case; you'll lose business."

Q. There has been a great deal of discussion of this case since the trial, has there not?

A. I would like to forget it, yes. It has occupied a great deal of my time.

Q. Now you stated that during the trial, among other things you read the Hatboro Spirit, is that correct?

A. They have it up at the drug store. I would go up for a soda. I didn't buy it. I picked it up and looked at the headlines.

Q. Hatboro is not in Bucks County, is it?

A. It is in Montgomery County.

Q. The paper is not published in Bucks County?

A. It is distributed in Bucks County quite extensively.

Q. Not published there?

A. Not published there, no.

Q. Now during this trial do I understand you to say that you saw one or two copies of the Intelligencer?

A. I didn't remember the name. I saw one or two copies of the newspaper from up there. I was interested in knowing what was going on in the case. I went to a friend's house; he had it and I took a look at it.

Q. Is that the way you ascertained what was going on in the case?

A. No, I followed the Philadelphia papers on that.

Q. That is how you got the information as to what was going on in the case?

A. I know nothing of what happened at the trial except from the (183) stenographer's notes having examined the transcript.

Q. So that you were not conferring with Mr. Rubin during the trial of the Zietz case?

A. Only insofar as we discussed matters from time to time which are confidential.

Q. You also represented Harry Zietz before the Board of Pardons, did you not?

A. Yes, for a year or so, but I have not represented him since the last decision of the Board of Pardons. I have ceased to be his attorney although I still remain the attorney for his mother and father.

Q. Mr. Farrier, you have appeared and argued numerous cases before the Supreme Court of Pennsylvania?

A. I imagine about 200 cases altogether in my lifetime experience.

Q. Before the Supreme Court?

A. Before the Appellate Courts, the United States Supreme Court, and other places, the Supreme and Superior Court of Pennsylvania.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION

BY MR. MARGIOTTI:

Q. Mr. Farrier, you have been asked about the appeal in this particular case; you entered your appearance for Zietz in the appeal; did you have anything to do with the preparation of the briefs in the Zietz case before the Supreme Court?

A. I prepared them exclusively myself.

Q. Did you collaborate in the preparation of those briefs with Mr. Rubin whom you say tried the case?

A. The only thing I did was submit my final draft before I sent it to the printer to him to see if he had any suggestions.

(184) Q. Did you in any way refer to the nature of this trial in your briefs? You have been asked whether you raised the questions.

A. I did.

Q. What did you say?

A. Well, the record speaks for itself. I can only give you my recollection.

Q. Give us your recollection.

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Where is that; do you have the record?

A. The briefs are in the possession of the Prothonotary of the Supreme Court of Pennsylvania for the Eastern District and what I said about this trial appears in that record, which is available to you or to the Court: I think it is a matter of record.

Q. Now you have answered that you did not raise a question of prejudice or feeling in the County. You have answered that question to the District Attorney who asked you that on cross-examination ——

A. Might I say, Mr. Margiotti, that I was not present at the trial. I, therefore, had no chance to observe any prejudice that may have existed there at the time. Therefore, I overlooked it in arguing my appeal.

Q. You say you overlooked it?

A. Overlooked what I didn't know.

Q. Well, if you had the experiences that you have related here (185) in the Court to this Honorable Court, why didn't you raise the question?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take the answer. You, sir, are the one who started this. We will take the answer.

BY THE WITNESS:

A. I did not raise the issue because I did not know it existed not having been at the trial to get the actual knowledge of the surrounding circumstances.

BY MR. MARGIOTTI:

Q. All right. Now, Mr. Farrier, will you please state whether or not you have given to the Court all the facts that

you recall now that were brought to your attention before the trial that would have any bearing upon the feelings or expressions of the public, or have you missed something? I just want to know if you told it all.

A. I have revealed what happened to me, what I saw, what I heard and what has happened since—up to the time of the trial and since so far as I have been permitted to say what happened since the trial with respect to the proceedings in the Supreme Court and other places.

Q. Have you prior to the end of the Darcy trial given your experiences with the public?

A. Up to the present time ——

Q. No, not up to the present time. Up to the end of the Darcy trial—from the date of the crime to the end of the Darcy trial have you covered it all?

A. There were some humorous things happened which I don't think (186) the Court will be interested in ——

Q. You don't know what the Court will be interested in ——

BY JUDGE MURPHY: Are you going to give us the humor since the trial?

BY THE WITNESS: No, before.

BY JUDGE MURPHY: You make an offer of the humor.

BY MR. MARGIOTTI: I didn't know that he said "humor."

BY JUDGE MURPHY: Yes.

BY THE WITNESS: What happened was this

BY JUDGE MURPHY: Are you interested in that?

BY MR. MARGIOTTI: No.

BY JUDGE MURPHY: If you want to make an offer of the incidents, we will be glad to give you an opportunity to confer with the witness, but we will have an offer first.

BY MR. MARGIOTTI: I don't know what they are.

May I have the witness step down?

Q. May I ask you one question, to get away from the humorous end of this thing: These witnesses that you say talked to you that you have described—which you have stated what they said, do you know whether any of them attended the trials?

BY JUDGE MURPHY: Read the question, Mr. Reporter. (187) (Question read by the Reporter.)

BY JUDGE MURPHY: You used the word "witnesses."

BY MR. MARGIOTTI: Strike out the "witnesses."

Q. The persons you talked to, do you know whether they had appeared at the trial?

A. From an examination of the stenographer's notes of testimony in the Zierz and Foster case I know that some of them attended the trial for they appeared as witnesses in the transcript.

Q. Do you know on which side they appeared?

A. For the prosecution.

Q. Do you know in which case or cases?

A. I believe that one of them appeared in both cases; according to the transcript, as I recall. I didn't see the Darcy transcript so I don't know.

Q. Would you mind telling me the name of that person?

A. Morris Phillips—Morris Phillips was one of them. I have reason to believe he testified in the Darcy case although I don't know it as a fact.

Q. Is he the only one?

A. He is the only one whose name I can recall at the present time.

Q. Do you mean that there were others or that you don't recall there were others?

A. Well, I talked to others that were in the robbery where I didn't either know their names or knew them by their first names. In that case I am helpless to tell you—to identify them here.

Q. Was Morris Phillips one of your clients?

A. Yes sir.

Q. You said something about some of your clients being held up?

(188) A. Some of my clients that I represented in law cases were in the hold-up.

Q. And you remember particularly what one, Morris Phillips, said?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it.

BY THE WITNESS:

A. I don't remember the exact phraseology.

BY MR. MARGIOTTI:

Q. You don't have to be exact—the substance of the conversation.

A. Oh, the substance of the conversation was "These fellows ought to burn."

BY JUDGE MURPHY: Let me ask you, Mr. Farrier, was Mr. Phillips one of the men in the room when the shots were fired?

BY THE WITNESS: Yes.

BY JUDGE MURPHY: He thought the men that were in there during the shooting should burn and he told you so?

BY THE WITNESS: Yes, in discussions at the Aders Gas Station.

BY MR. MARGIOTTI: If the Court please, if I may, I would like to place on the record that this witness was shown as appearing as a witness in the Darcy case; on Page 548 Mr. Philip Morris appeared as a witness.

BY JUDGE MURPHY: (189) Is it Morris Phillips or Philip Morris?

BY MR. MARGIOTTI: It is Morris Phillips.

BY MR. MARGIOTTI: That is all.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Now, Mr. Farrier, Mr. Phillips was one of the victims of the robbery, is that correct?

A. Yes sir.

Q. He stated to you an opinion that they "ought to burn?"

A. He made that remark to me when I stopped to get gas at his station.

Q. About when was that?

A. That was very shortly—that was very shortly after the murder.

Q. Did he make any distinction or differentiation between Zietz, Foster, Darcy or Capone?

A. He did to this extent, he says "Your boy fired the shot." That is the only thing I remember to differentiate. His opinion was generally the same as to all of them.

Q. And on the appeal which you took you raised no question, did you, about the testimony of Mr Phillips at the trial of the Zietz case?

A. Heavens, no.

Q. Now you stated, I believe, also that on the appeal you didn't know about certain things and, therefore, you didn't raise this question or possible question of prejudice or hysteria, is that correct?

A. That is correct.

Q. You knew about all these conversations you testified to, didn't you?

(190) A. I certainly did and didn't blame them for holding those kind of opinions, if you want to know it.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Farrier, don't answer this question until the Court tells you to: Will you state whether or not you raised the question that the trial was unfair and partial? Don't answer that question.

There is no objection. Go ahead. Did you raise that question?

A. My brief in the Prothonotary's office and with the Supreme Court pointed out in what respects I thought that the trial was unfair, and I was honest and sincere in so contending but the Supreme Court, the majority of them, disagreed with me so I don't know that it makes any difference now.

BY JUDGE MURPHY: I might say that the Court will take judicial knowledge of the Supreme Court and the only one was 6 to 1. The one that dissented was on other two phases. We will take judicial knowledge of what the phases were, neither of which has been mentioned by this witness.

BY MR. MARGIOTTI: That is all.

BY JUDGE MURPHY: Sir, you have used the expression that they "ganged up" on you. We think that ought to be made clear. Who "ganged up" on you?

BY THE WITNESS: Why, I think the Court

(191) BY JUDGE MURPHY: First, when did they "gang up" on you?

BY THE WITNESS: It was sort of a periodical thing. It came along every time two or three or a half dozen got together. They would - I think the Court got a misapprehension of what I meant ——

BY JUDGE MURPHY: We certainly did and we want no one to have misapprehensions; we want facts.

BY THE WITNESS: They would take the position that it was up to me to justify my position so they would make remarks.

BY JUDGE MURPHY: Were they friends or foes?

BY THE WITNESS: Both.

BY JUDGE MURPHY: How did the boys "gang up" on you? What did they do?

BY THE WITNESS: Well, they told me they sometimes used the remark they believed in the lex talionis.

BY JUDGE MURPHY: And by that you thought they meant what?

BY THE WITNESS: They wanted an eye for an eye, a tooth for a tooth.

BY JUDGE MURPHY: The Mosiac Law.

BY THE WITNESS: The Mosiac Law. Then they would enlarge on that.

(492) BY JUDGE MURPHY: Is that what you mean by "ganged up"?

BY THE WITNESS: Verbally. Some were kidding me; some were sincere. It was difficult for me to say who was sincere and who wasn't. At least they were displeased with what I was doing and they let me know it.

Will you ask me whether I am here under my own accord or whether I am here under subpoena?

BY JUDGE MURPHY: I think I ought to ask you that to show you were subpoenaed. You are here under subpoena?

BY THE WITNESS: I am, sir.

BY JUDGE MURPHY: From the defense?

BY THE WITNESS: From the defense? I want to make that clear.

BY JUDGE MURPHY: By defense you mean the Relator, Mr. Margiotti's client; at least his side has subpoenaed you here and that is why you are here?

BY THE WITNESS: Yes.

BY MR. MARGIOTTI: And you are here?

BY THE WITNESS: Yes.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

(193) MR. A. RUSSELL THOMAS, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Thomas, where do you live?
A. Doylestown, Pennsylvania.
Q. How long have you lived there?
A. About thirty-five years.
Q. A married man, I assume. Married?
A. Yes sir.

Mr. A. Russell Thomas Direct

Q. Will you state what your occupation is?

A. I am a newspaper reporter.

Q. For what newspaper?

A. Doylestown Daily Intelligencer and I have a News Bureau of my own that I represent the metropolitan papers.

Q. The Doylestown Daily Intelligencer; and you are a reporter for the daily paper then?

A. That is right.

Q. At that time, the time of the Darcy trial, will you state whether it was a daily paper then?

A. It was.

Q. And had been before that?

A. That is right.

Q. For how long?

A. 25 years this July.

Q. Do you know what the circulation of your paper was at that time?

A. I have nothing to do with the circulation but, I estimate about 6,500 daily.

Q. About 6,500 daily?

1945 A. About 6,500 daily.

Q. Will you state whether your subscribers your distribution was principally in Bucks County?

A. Principally so, yes.

Q. And what part of Bucks County does your paper reach?

A. Well, at that time it was pretty well spread; principally however, in the center, Doylestown, Newtown, part of Montgomery Valley and spread throughout the County, but mostly in the center of the County.

Q. I see. Some question has arisen here about the population of Bucks County in 1948, in June of 1948. Do you have any knowledge by census knowledge or otherwise of the population of that County at that time?

A. I don't, Mr. Margiotti. I wrote a story just recently about the increase in population. I couldn't say.

Q. As a newspaper reporter will you state whether or not you covered the Foster-Zietz trial and the Darcy trial?

A. I did.

Q. Covered both of them?

A. I did.

Q. Now I would like—at some point or another in this case we are going to give a description of that courtroom and I would like to develop it by you. How does the courtroom in Doylestown, say, compare with this one?

A. It is much larger.

Q. What is that?

A. It is much larger.

Q. How many courtrooms are there in the courthouse?

A. There are three. I don't know whether there were three at that time. I am not quite sure, but there are three now.

(195) Q. What was the large—where was the large courtroom located?

A. The large courtroom is located—after you enter the main entrance of the courthouse and walk in through the corridor you go into this large courtroom, which is one of the finest of its kind in Pennsylvania.

Q. Was it on the first or second floor?

A. It is on the first floor.

Q. It is on the first floor——

A. You walk down into an amphitheater to get into it.

Q. I see. Is that the courtroom in which the trials were held?

A. Yes.

Q. Both trials?

A. I think so. I am not quite sure. Well, I am almost sure; yes.

Q. As you walk in the—let's say you go in the main entrance to that courtroom, the public main entrance; I assume the public main entrance would be back in there?

A. Yes.

Q. Now then, as you come in the main entrance what faces you?

A. The interior you mean — —

Q. Yes. Give us a description.

A. On the right at that time there was the office of the Clerk of Quarter Sessions, a small office, and going down on the right was the Register of Wills.

Q. You mean in the courtroom?

A. As we are going into the court.

Q. In the courtroom?

A. In the courtroom.

Q. Yes.

A. What faces the courtroom when you get inside

(196) Q. When you get into the courtroom you enter from the outside ——

A. You go into a large courtroom. The bar of the Court is just ahead of you. The seats are in here.

Q. Just about the bench is here. Where was the jury box? Where was the jury box?

A. Well, we are coming in this way. The jury would be down here.

Q. In other words, it would be to the left of the Judge as Judge Murphy is sitting?

A. That is right.

Q. Where would the spectators sit?

A. Right back there where your people are now.

Q. Were there any seats back of the jury box?

A. Yes.

Q. For spectators?

A. For jurors.

Q. Were the jurors, I am talking about, back of where the jury was sitting?

A. They were. I think the jurors sat right in back of where

the jurors were in the box. I don't think the spectators are allowed directly in back of them. The spectators sit in the middle aisle and on the other ——

BY JUDGE MURPHY: I understand you to say there is a courtroom in Pennsylvania where jurors sit behind the jury box. Do you mean that?

BY THE WITNESS: Yes.

BY JUDGE MURPHY: You mean that the twelve jurors sat there; there are seats back behind so they can't see what is going on in the courtroom?

(197) BY THE WITNESS: Yes.

BY JUDGE MURPHY: Is that so?

BY THE WITNESS: Yes. Unless I am entirely wrong. There is a separation between—there is an aisle in between.

BY MR. MARGIOTTI:

Q. Here we are at the door entering the courtroom back here where that panel is ——

A. All right.

Q. Is there an aisle leading up toward the bench?

A. That is right.

Q. You said it was a sort of an amphitheater?

A. Yes.

Q. You walk down the aisle?

A. Yes.

Q. It goes downgrade?

A. That is right.

Q. What have you to either side in the courtroom?

A. There is a railing that separates the front seats of t courtroom, the bench and where the attorneys' tables are a the jury is over on the one side, but this amphitheater goes the way around. There are jurors—when they call jurors in ordinary case the jurors sit in back of the jury box. It is pla as day if you have been there.

Q. You mean on the right-hand side and left there are sea for the accommodation of the public?

A. That is right.

(198) Q. Does these seats on the right-hand side extend the rear of the jury box?

A. Right.

Q. How many rows of seats extend back there?

A. I don't know.

Q. Several rows?

A. Yes.

Q. Then your jury box is in front of those seats?

A. On the extreme side, yes, the jury—separate chairs a used in front.

Q. Would the box be like the jury box is here?

A. No, they are flat on the floor. There is no railing on t front.

Q. They are flat on the floor?

A. Right; black leather seats.

Q. Twelve or fourteen chairs ——

A. That is right.

Q. —— are all on the flat, not raised?

A. They are not raised.

Q. There is no railing in front of the jury box?

A. No.

Q. What separates the jurors from the spectators in back?

A. There is a railing, a wooden railing, and a partition back of that box.

Q. That could be occupied by the public?

A. There is an aisle where spectators can walk through or lawyers before you get to the jurors. If I make myself clear, there is an aisle where they can walk through there, it isn't up against—where if jurors are not called in the box they are not really up against. There is walking space that leads into the attorney's room.

(499) Q. There is walking space between the seats occupied by jurors and spectators?

A. Yes sir.

Q. How long would you say that walking space is?

A. I don't know, but I imagine about 10 feet.

Q. What is on the opposite side of the courtroom? We will go over to the left.

A. Well, it is the same—spectators all the way around on the other side.

Q. Will you describe the position to the left of His Honor? I am going to take the position to the right of His Honor so we won't get confused.

A. On the right is a nice big fire-place ——

BY JUDGE MURPHY: Could this possibly add any light?

BY MR. MARGIOTTI: It is going to later on.

BY JUDGE MURPHY: I mean the fire-place.

BY MR. MARGIOTTI: This is the fire-place. There is going to be some testimony describing the location of certain persons when certain things happened at the time. Otherwise, I don't think it makes any difference.

Q. Where does the lawyers sit?

A. Well, they are in back; in this lower semicircle there is a row of chairs and the lawyers—there is prisoners' row in back

of the Commonwealth bench or table, whatever you call it which is prisoners' row and the lawyers sit in chairs to the right of (200) the Judge down in this front. There is a reporters' table also right on that right side and the spectators go all the way around then to the other end.

Q. Then there are places for spectators over in that end who are in full view of the jury?

A. That is right.

Q. Now then, there are chairs, you say, over in that end?

A. Yes.

Q. And reporters sit over there?

A. Yes, there is a table there, a table

Q. Do you people sit at that table?

A. Sometimes.

Q. Then the defense table is between the reporters' table and the Commonwealth's table; is that right?

A. The defense table faces the Judge, to his left, and right to the left of the jury also, and the Commonwealth's table is directly opposite at a right angle there. I hope I make that clear.

Q. Mr. Thomas, how many sessions of the Foster-Zietz trial did you attend?

A. In numbers, I don't know, but I think I covered probably —I think I covered practically every session. I might have missed a few where we had assistants and substitutes come in, but I covered practically the whole thing.

Q. What would you say with reference to covering the Darcy trial?

A. I think the whole thing I covered.

Q. You covered every session?

A. Uh huh.

Q. Do you remember who the Judge was in the Darcy trial?

A. President Judge Hiram H. Keller.

(201) Q. In that County at that time did your Judges wear robes when they sat on the bench?

A. I am not quite sure. They changed around that time. I am not quite sure.

Q. Whose room was this, this main courtroom; who occupied that room, which Judge?

A. I don't think there is any designated Judge for any particular courtroom in Bucks County.

Q. And were there cases in the other two courtrooms you spoke of?

A. The other two courtrooms are on the second floor; one in the front of the courthouse and one in the rear.

Q. Now, did you cover the killing of Kelly at Feasterville?

A. No, I did not. That is being down there—

Q. Yes.

A. No.

Q. Did your paper cover it?

A. Oh, yes.

BY MR. MARGIOTTI: Will the Court bear with us a few minutes?

BY JUDGE MURPHY: While they are waiting, I just want to get an answer to two questions just so I will have my notes on them. Is Mr. Achey, the lawyer who defended Mr. Darcy, still living?

BY THE WITNESS: He is deceased.

BY JUDGE MURPHY: When did he die?

BY THE WITNESS: (202) About a year ago. I am not quite sure.

BY JUDGE MURPHY: You don't know when?

BY THE WITNESS: I don't know the exact date.

BY JUDGE MURPHY: Is Judge Keller and Judge Boy still living?

BY THE WITNESS: Judge Boyer is deceased.

BY JUDGE MURPHY: When did he die, if you know?

BY THE WITNESS: I don't know. It is within a coup of years.

BY JUDGE MURPHY: At any rate, Mr. Achey and Jud Boyer are dead?

BY THE WITNESS: They are deceased.

(Photostatic copies of pages of issues of the Doylestow Daily Intelligencer marked "Relator's Exhibits Nos. 12 to 33 inclusive.)

BY MR. MARGIOTTI:

Q. Now, Mr. Butler—or Mr. Thomas, there are other pape published in your County?

A. Yes, there are.

Q. And which paper has the largest circulation?

A. At this time ——

Q. At that time.

A. I think the Intelligencer at that time.

Q. Now, have you been subpoenaed to bring with you t copy of (203) the original papers as published and circulat by the Doylestown Daily Intelligencer in Bucks County b tween December 22, 1947 and January 15—June 15, 1948?

A. Well, I was not, Mr. Margiotti. Mr. Thompson was left last night and the papers are here.

Q. The papers are here?

A. That is right.

Q. You know that those papers are here?

A. Yes, I do.

Q. I am now going to show you what we have marked temporarily for identification, "Relator's Exhibits Nos. 12 to 33," inclusive, being a photostat of your paper between the dates of December 23, 1947 and February 3, 1948—yes, February 3, 1948. Will you tell me whether or not these are photostats of your originals that are here?

BY MR. MARGIOTTI: Your Honor, we have only selected those papers that have something to do with the case.

BY JUDGE MURPHY: Just so the record will be straight, you said "Relator's Exhibits Nos. 12 to 33" covered from December 22, 1947 to June 15, 1948. We understand that now to be corrected to February 3, 1948.

BY MR. MARGIOTTI: Yes, there are some others there and I wanted to make them other exhibits. That is why I proceeded with what I had originally.

BY JUDGE MURPHY: All right.

(204) BY MR. MARGIOTTI: I am quite certain they are correct photostatic copies.

If the Court please, we have the original papers here and these are the photostats, as the witness has indicated, and we offer the originals and ask leave to substitute photostats.

BY MR. VAN ARTSDALEN: We object to the offer, not as to the authenticity but as to the materiality of the offer, and the relevancy.

BY JUDGE MURPHY: We are prepared to hear your argument.

BY MR. RYDER: The Respondent's position with relation to this offer is entirely predicated upon the decision of the Circuit Court of Appeals for the Eighth Circuit reported in 300 F. 2d 769.

BY JUDGE MURPHY: You don't mean that

BY MR. RYDER: 300 Fed. 769, Page 788.

BY JUDGE MURPHY: 300 Fed. 769 at Page 788.

BY MR. RYDER: The decision of the Court involved an application for a motion for a new trial on the ground newspapers published during the course of the trial had been read or could have possibly been read by the jurors, and the Trial Court has refused to consider the affidavits submitted by jurors as well as the newspaper publications.

BY JUDGE MURPHY: (205) What is the name of the case?

BY MR. RYDER: Stewart v. United States.

BY JUDGE MURPHY: There are three Circuit cases on that proposition. They are cited in the Stoehr case, 100 F. Supp. Mr. Margiotti has had the other side of the case.

BY MR. RYDER: I am not familiar with that case. I thought this case was entirely on point.

BY JUDGE MURPHY: You go ahead. We suggest you look at 100 F. Supp.

BY MR. RYDER: The Court said:

"The affidavit of the publication of the excerpts from the newspapers and the excerpts themselves were immaterial, without evidence other than that of the jurors tending to show that they were read by the jurors, and the receipt of the affidavits of the jurors and of the excerpts from the newspapers in evidence and the grant of a new trial on account of them would have constituted both error of law and an abuse of the discretion of the court . . ."

BY JUDGE MURPHY: Well, notwithstanding what you have read, the situation here is a little different: The question here is that this Court has a Mandate to try to find out if there was such a situation of hysteria and prejudice in Doylestown in Bucks County, Pennsylvania in the week of June 7, 1948 as to prevent (206) this defendant from having a fair and impartial trial. Your objection is overruled. We will take it for whatever light it will give. It is one of the media of communication that might possibly have gotten to the jurors.

BY MR. MARGIOTTI: For the record I may state that these publications cover Tuesday Afternoon, December 23—

BY JUDGE MURPHY: You are not going to read all those the exhibits?

BY MR. MARGIOTTI: No.

BY JUDGE MURPHY: December 22, 1947, "Relator's Exhibits Nos. 12 to 33," inclusive, they cover some time between that period——

BY MR. MARGIOTTI: And February 3, 1948.

BY JUDGE MURPHY: I might say to you if you look at

the cases, the Stoehr case and Judge McLaughlin's opinion cited in the Stoehr case; you will find the Third Circuit's attitude on the same and you will find Judge Holmes' case that mere possibility of abuse does not mean that there was.

BY MR. MARGIOTTI: While Mr. Butler is marking the other exhibits I would suggest while he is doing that we have a little recess.

BY JUDGE MURPHY: Well instead of taking a ten-minute recess now—Mr. Butler has to have a recess now—has counsel any idea as to what dates they go to?

(207) BY MR. MARGIOTTI: I can state that. These start with Friday, February 6, and they end with Saturday, June 19.

BY JUDGE MURPHY: All right then, there are a batch of papers from February 6 to June 19, 1948 which will be marked "Relator's Exhibits No. 34" to sufficient number to include all of them.

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: And we suggest that the Clerk write those down now so that counsel can proceed with the examination and have the gentleman on the stand say whether or not they are true copies and after the recess we will have them marked with numbers.

BY MR. MARGIOTTI: There are two or three exhibits which I am going to call attention of the witness to which I would like to have marked.

BY JUDGE MURPHY: I might say we will do that.

When we take a recess the Reporter is going to get a rest. That one you can single out by the date of the paper. Then we will follow it up by a particular exhibit mark.

BY MR. MARGIOTTI: O.K.

Q. Mr. Thomas, looking at the exhibits that are before you will you select the exhibit that followed the reporting of the verdicts in the Foster and Zietz case or cases?

BY JUDGE MURPHY: Can't that date be ascertained? The notes will show the date of the verdict.

(208) BY MR. MARGIOTTI: Which I understand to be June 4.

BY THE COURT (Addressing the witness): You are about two months off. If you start at the end you will get it quicker. They end at the 19th. Go back to the front.

BY MR. MARGIOTTI:

Q. Now I want you to look at the exhibit which is a photostat of the Doylestown Daily Intelligencer as of Saturday, June 5, 1948, a front page story on the right-hand side headed—I call your particular attention to that particular column which is headed "Judge Boyer Praises Jury For Verdict Condemning 2 Killers To Electric Chair. Do you observe that story?

A. I wrote the story. I didn't write the heading. I wrote the story.

Q. You wrote the story?

A. That is right.

Q. If you will look at that story about the second or third paragraph, you will find that the Judge is quoted.

A. That is right.

Q. Did you write that?

A. I did.

Q. And where did you get those quotations?

A. They came from the Judge's own lips.

Q. And under what circumstances?

A. So far as—I don't know whether I misquoted him or not. I don't think I did. I don't take shorthand but I took it down as I thought he said it; and the particular time he made the statement it was at the—I think it was right at the completion when the verdict was rendered in the Zietz-Foster trial.

(209) Q. Will you state whether or not the jury was present at the time he made the statement?

A. I don't know, Mr. Margiotti. I don't know whether this story would indicate that or not; whether they had been discharged or were about to be discharged. I don't know, and the story doesn't seem to say—just a second! It has been so long ago I really can't say whether the jury were there or not.

Q. Will you state whether or not the Judge was on the bench when he made the statement?

A. Oh, yes, or I wouldn't have quoted him. I am almost positive of that.

Q. The part that is in quotations, which you say came from the Judge's own lips, is as follows:

"I don't see how you could, under the evidence, have reached any other verdict . . . Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days . . ." ——

BY JUDGE MURPHY: Was there a transcript taken in the Court of the Judge's remarks?

I say this with all due respects to the local papers. We have excellent papers. But in last evening's paper this Court is

quoted saying something yesterday which we did not say. We said just the opposite.

BY MR. MARGIOTTI: Sometimes these things do occur. They happen to me also. But, generally speaking, the papers are correct.

(210) "... 'The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision,' Judge Boyer said."

Those are the quotations that you spoke of —

BY JUDGE MURPHY: We will say to counsel if there is a Court record of what the Court said, instead of this gentleman's interpretation of it, we say it would be most helpful.

BY MR. MARGIOTTI: We agree with you.

BY JUDGE MURPHY: If there isn't, this is the next best evidence and on its own it is a circumstance as to what the public saw. But as to what Judge Boyer actually said, this is this gentleman's interpretation and it may be exactly accurate, I don't know.

BY MR. MARGIOTTI:

Q. May I ask you this question: Did Judge Boyer at any time correct this quotation or call you on the quotation and state that you had misquoted him in a publication that went County-wide?

BY MR. VAN ARTSDALEN: I object.

BY THE WITNESS:

A. No sir.

BY JUDGE MURPHY: We will take it and we will say we are not going to call the Scranton Times, either.

BY MR. MARGIOTTI: The Scranton Times is not on trial. I don't think (211) you would make a statement of this type if you were trying a case of this type. I am sure you wouldn't.

Q. At least, no one ever corrected it?

A. Not that I know of.

BY JUDGE MURPHY: The Scranton Times story was 99.99% correct. There was one sentence that they quoted the Court as saying which we did not say. By .01% they were wrong.

BY MR. MARGIOTTI:

Q. Will you state now, Mr. Thomas, at the time the Judge uttered these words from his own lips, as you say, whether there were any other persons present in the courtroom?

A. Yes, there were people present in the courtroom.

Q. Who, for instance?

A. I think there were some spectators there; I don't know how many. There were some other newspapermen there and Court officers.

Q. Do you know whether any other newspapermen picked up the same story and wrote it?

A. I really don't know. I only know that I sent that story out.

Q. Did you send that story to somebody else?

A. Yes, it was sent around.

Q. To whom did you send it?

A. I don't recall exactly. I sent it to the papers that I represented at the time, the Inquirer, the Bulletin, the Daily News

Philadelphia, and the News Services, the Associated Press, the International News Service and the United Press. I don't know whether they used it or not but it was sent. I remember that distinctly.

Q. Did you send it to any papers in your County?

A. The Bristol Courier.

(212) Q. Is there a connection between the Bristol Courier and your paper?

A. They are owned by the same man.

Q. Is that Mr. Grundy's paper?

A. That is right.

Q. Do you know whether or not the Bristol Courier used the statement?

A. I don't know.

BY JUDGE MURPHY: This paper that has been introduced in evidence was the issue of June 5, and there is some quotation of Judge Boyer, and what I want to know is is this the item which appeared in the Petition for Habeas Corpus that was presented to the District Court as well as the item which appeared in the Petition for Habeas Corpus which was presented to the Supreme Court of Pennsylvania in the paper known as the second Petition for Habeas Corpus?

BY MR. MARGIOTTI: I say yes to that.

BY JUDGE MURPHY: Was it in entirety in the Petition as it is now offered in evidence?

BY MR. MARGIOTTI: It was entirely in the Petition.

BY JUDGE MURPHY: I want to make one observation so that there will be no possible misunderstanding, Mr. Margiotti: We realize that when reporters are in court the Court Reporter

has nothing to do except take down what happens whereas the reporter has to meet a deadline, they have to get things on the run, and that for that (213) reason there may be discrepancies, but they do occur.

BY MR. MARGIOTTI: They even occur with lawyers.

BY JUDGE MURPHY: Well, let's get the Court straight.

BY MR. MARGIOTTI:

Q. I show you now a photostat—an exhibit of Saturday Afternoon, June 12, in which Judge Boyer is quoted concerning "Thieves From Philadelphia."

A. Yes, I see it.

Q. Did you write the story with the exception of the headlines?

A. No, I did not write that story.

Q. Who wrote that story?

A. Probably another man on the staff, but it was a different courtroom entirely from where I was that day.

Q. Who else was on your staff that day—Mr. Trauch?

A. W. Lester Trauch, and duty that day I just don't recall, it would be just a case—we were the two court reporters.

Q. O. K.

BY JUDGE MURPHY: Now for the record the quote which Mr. Margiotti has read from the issue of June 7 appears at Page 414 of 203 F. 2d and it also appears on Page 4 of the Petition for Habeas Corpus.

I am just trying to get them into the record for whoever reads them later on.

There is a footnote on Page 414.

BY MR. MARGIOTTI:

Q. How about the attendance at the Foster-Zietz trial?

A. What way do you mean, Mr. Margiotti?

(214) Q. First, how about the attendance in the courtroom or outside the courtroom, people trying to get in?

A. It was probably larger than an ordinary assault and battery case. There was more interest in it and naturally there were more people there.

Q. What I want to know is was the courtroom filled?

A. I think at times it was fairly filled. The time the verdict came in I don't remember how many people were there, probably three-quarters filled. There was pretty fair attendance.

Q. During the trial itself ——

A. I would say more people than usual were at the trial.

Q. What would you say about its capacity, whether it was filled, three-quarters filled, one-half filled?

A. It varied at times according to the stage of the case.

Q. Were there times people were on the outside trying to get in?

A. I don't think so.

Q. Would your answers apply to the Darcy trial too?

A. Yes, I think it would.

BY MR. MARGIOTTI: That is all for the present.

I would like to release the original files of this witness if there is no objection on the part of the Commonwealth.

BY MR. VAN ARTSDALEN: We haven't objected to the authenticity.

BY JUDGE MURPHY: Do you object to substituting photostats in place of the originals?

BY MR. VAN ARTSDALEN: No, certainly not.

BY JUDGE MURPHY: (215) They will be received.

Now we will accept the photostats instead of the originals. May we say we hope somewhere along the line it will be developed the jury was kept together and whether or not the jury, which had been selected in the early part of the week of June 7, was permitted to read the Doylestown Daily Intelligencer while they were segregated. First of all, were they segregated? Judge Biggs says there is nothing to show that in his opinion, but certainly everyone in this County would be segregated. Was this one segregated and were they permitted to read the daily papers?

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Thomas, you have stated the circulation was approximately 6,500 at the time of the trial?

A. That may be a little bit high.

Q. None of these papers indicate, the photostats, what the circulation was?

A. Maybe every six months. I don't believe any of those do.

Q. You are not in charge of the circulation in any way so that it is merely an estimate on your part based on what you heard?

A. That is right.

Q. All right. Now then, you stated you were present throughout the Foster-Zietz trial?

A. Most of the time.

Q. Most of the time. Would you say that the courtroom would seat approximately 500 spectators?

A. I think that is about right.

Q. Now then, during the Foster-Zietz trial did you at any time observe any outbursts by any of the spectators?

A. No, none whatsoever.

(216) Q. Was the courtroom at any time during the Foster-Zietz trial cleared by the Court because of any commotion or disturbance?

A. Not that I recall. I am almost sure it wasn't.

Q. Did you observe any persons making threatening gestures of any sort during the trial of the case, any of the spectators?

A. No.

Q. Was there anything out of the way so far as the behavior of the spectators and attendants at that trial that you observed?

A. Not that I observed.

Q. And I believe you stated at times the courtroom was not filled?

A. That is correct.

Q. Did you observe any crowd, any large crowd, hanging around outside the courtroom at all?

A. There were more people than in the regular criminal case during the noon recess and a lot of newspapermen and photographers and so on around.

Q. Incidentally were any photographs allowed during the Foster-Zietz trial?

A. We tried it and didn't get away with it.

Q. The Court would not allow it?

A. That is right.

Q. Does that also apply to the Darcy trial?

A. That is right.

Q. Mr. Thomas, you have testified as to the layout of the courtroom and I don't want to labor that, but is it not a fact that the jury in the Foster-Zietz trial and also in the Darcy trial always came in and went out through a side door?

A. You mean the door to the right ——

(217) Q. Let me ask you this: The jury box—the jury sits in a row of chairs, is that correct?

A. That is right.

Q. Is there not a door leading to a little corridor under the courthouse approximately ten feet from where the foreman of the jury was?

A. That is right.

Q. It was through that door that the jury was—at all times came in and were brought from the courtroom?

A. Yes. In fact, you didn't ask me—that is the way the jurors came in.

Q. So that the jury at no time was taken down through the main corridor?

A. No sir.

Q. Did they at any time come into contact with the spectators?

A. You mean the jury in the box ——

Q. Did they at any time come into contact with the spectators?

A. No, they did not, not that I saw.

Q. How about the prisoners, were they also brought in and taken out through the side door?

A. That is right.

Q. At any time did you see them come through the main courtroom?

A. No.

Q. Do you know whether the jury was taken through the persons outside the courtroom?

A. I don't know.

Q. Did you at any time see the jury on the streets of Doylestown during the trial of either the Darcy or the Foster-Zietz case?

BY MR. MARGIOTTI: We object, not cross-examination.

(218) BY JUDGE MURPHY: We will permit it. I sup-

pose you mean did he see them seriatim or group, or what do you mean?

BY THE WITNESS: I don't know. I might have seen them going over to the hotel in a group.

BY JUDGE MURPHY: Do you mean he saw them separately or seen the jury as jury?

BY MR. VAN ARTSDALEN: The jury as jury.

BY THE WITNESS: On the streets in Doylestown ——

BY MR. VAN ARTSDALEN: Yes.

BY THE WITNESS: Yes, I noticed them going over to the quarters where they slept.

BY MR. VAN ARTSDALEN:

Q. On those occasions were they in charge, or did you see? How many tipstaffs were in charge of that jury?

A. Well, I didn't observe it, but I imagine they would be.

Q. Were they in a group?

A. Yes, they were in a group.

Q. Now, Mr. Thomas, coming down specifically to the Darcy trial were you in attendance throughout the trial of that case?

A. Yes.

Q. Is it not a fact that the number of spectators that attended the sessions of the Darcy trial were far fewer than the number that attended the sessions of the Foster-Zietz trial the week (219) before?

A. I believe you are quite right in that statement.

Q. The evidence that was produced in the Darcy trial was

to a large extent repetitious of the evidence that was produced in the Foster-Zietz case?

A. Yes sir; so far as I could observe, it was.

Q. Now did you observe any outbursts of any sort or any commotions of any sort during the week of the Darcy trial?

A. I did not, in any of the three trials.

Q. Did you see any of the spectators or witnesses make any gestures of any sort toward the jury or toward the defendant?

A. Nothing I ever saw inside the courtroom, no.

Q. Did you observe anything out of the way—anything out of the ordinary—in the course of that trial?

A. No, not that attracted my attention as a newspaperman.

Q. Have you observed, as a newspaperman, the trial of other criminal cases?

A. I have.

Q. Was there anything in the trial of this case, of the Darcy case, that appeared to you in any way out of the ordinary from the other trials?

BY MR. MARGIOTTI: We object, immaterial.

BY JUDGE MURPHY: You are now in the place where you objected before when the lawyer from Philadelphia was on the stand. You are asking this man to make a comparison. We will permit you to ask the question as to whether or not he saw anything happen at this trial which he had not observed at other trials.

BY MR. MARGIOTTI: (220) We have no objection to that.

BY MR. VAN ARTSDALEN:

Q. Did you observe anything at this trial that you had not observed happen at other trials?

A. You mean other trials.——

BY JUDGE MURPHY: Other murder trials.

BY MR. VAN ARTSDALEN:

Q. Other murder trials.

A. No; I would say no.

Q. Now, Mr. Thomas, as a newspaper reporter is it not true that you try to write articles that will be of interest to the public?

A. Try to.

Q. And is it not also true that at times you try to enlarge upon the facts to some extent for the purpose of interesting the public?

A. You will have to qualify that. I don't know what you mean by that.

BY JUDGE MURPHY: We will take a ten-minute recess.

(Recess.)

(Photostatic copies of pages of the Doylestown Daily Intelligencer marked "Relator's Exhibits Nos. 34 to 106," inclusive.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

MR. A. RUSSELL THOMAS, recalled.

CROSS-EXAMINATION (Continued).

BY MR. VAN ARTSDALEN:

Q. Mr. Thomas, during the course of the Darcy trial did you see or observe any mass demonstrations in Doylestown?

A. In the courthouse ——

(221) Q. In the courthouse.

A. No, I did not.

Q. Outside the courthouse?

A. No, I did not.

Q. Mr. Thomas, I want to call your attention to "Relator's Exhibit No. 94," being the paper dated Saturday Afternoon, June 12, 1948. There appears an article on the left hand side headed:

"Judge Boyer Warns That Bucks County Is Tired Of Thieves From Phila."

I believe you stated you did not write that article, is that right?

A. No, I did not.

Q. All right, sir. Were you in the main courtroom where the Darcy trial was in progress during the course of that day?

A. I might have been in and out, I can't say, Mr. Van Artsdalen; I can't testify.

Q. Now I call your attention, Mr. Thomas, in this article to a statement reputedly made by Judge Boyer: "Have you heard what's going on down stairs?"

A. I don't know anything at all about that.

Q. All right. You have testified, however, that there are other courtrooms in the Doylestown, Bucks County, Courthouse?

A. There are two others.

Q. The other two are on the upstairs, is that right?

A. That is right.

Q. Now, were you present when the Foster-Zietz verdict was rendered?

A. When the verdict was rendered I am not certain whether I was at the telephone. I was in the courthouse. I believe I was in the courtroom.

Q. Do you recall whether there was any outburst of any kind at the (222) time that verdict was rendered by the jury?

A. Nothing that was noticeable to me, if I was there. I am not quite sure I was in the side room telephoning. I think I was in the courtroom but I don't recall of any outburst.

Q. Did you hear or observe any applause, any shouting, of any kind?

A. I don't recall any.

Q. Were you in the courtroom when the Darcy verdict was rendered?

A. Yes sir.

Q. That verdict was rendered at 4:30 Friday Afternoon—around 4:30 in the afternoon; is that correct?

A. I think it was late afternoon.

Q. All right, sir. And you say you were present at that time?

A. Yes sir.

Q. Was there any demonstration at the time that that verdict was rendered by any persons in the courtroom?

A. Not that I noticed. I was pretty busy at that time.

Q. Was there any outburst?

A. Not that I noticed.

Q. Was there any applause?

A. Not that I noticed?

Q. Any shouts?

A. Not that I noticed.

Q. Mr. Thomas, have you examined all these exhibits to

ascertain whether or not they contain all of the articles there were in the Intelligencer?

A. No, I haven't looked at them all. I haven't any way of telling that. I looked over those and identified them as copies of the Intelligencer.

(223) Q. So that you would not know whether there might have appeared other articles?

A. Yes, I wrote most of those things. I did not write the heads or edit the stories but I wrote the articles.

BY MR. VAN ARTSDALEN: All right, sir, that is all.

Q. Mr. Thomas, I believe that you stated on direct examination that the halls were not filled during the trial of Foster-Zietz?

A. You mean the courtroom ——

Q. The halls outside the courtroom.

A. Oh, I have no—I don't remember that. They were filled as they were going into Court I know. I mean when Court convened there were quite a few people but there was no disorder of any kind I saw.

Q. You didn't observe any disorder of any sort in or about the courtroom during either the trial of Zietz-Foster or Darcy?

A. I did not, personally.

BY MR. VAN ARTSDALEN: All right, that is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Thomas, did you observe the number of police officers, either State or local police or other officials, who were there for the purposes of maintaining order?

A. Yes, I think they did a pretty good job on that.

Q. How many were there?

A. ~~Oh~~ I don't know, but they had plenty of police there. They were taking no chances.

Q. They were taking no chances?

A. That is right.

Q. About how many?

(224) A. I don't know. I think there were State Troopers, Deputy Sheriffs, the usual number in a murder case.

Q. How many State Police?

A. I didn't check up on all those people.

Q. Do you remember who had charge?

A. No, I wouldn't know.

Q. Were they in uniform?

A. That I don't recall. I think there were some people in uniform. I don't know whether they were Troopers ——

Q. Were the police in Court or outside, or both?

A. I saw both. I saw Troopers sitting in the inside of the courthouse.

Q. Did you see police on the outside?

A. I don't think I did, no. I didn't notice them. I was inside.

Q. They were there to maintain order and they did a pretty good job of maintaining order?

A. They did that.

Q. All right. And that applies to the Darcy trial as well as the other trial?

A. Yes, it does, Mr. Margiotti.

Q. Now you had called to your attention the newspaper of June 12 and I think there was read to you some statement by Judge Boyer, "Have you heard what's going on downstairs?" Do you know whether or not such a statement was made?

A. I don't know.

Q. You know nothing about it?

A. I know nothing whatsoever about it.
Q. You didn't write that story?
A. No.

BY MR. MARGIOTTI: (225) We had a witness here on the circulation of this paper and we excused him because we understood this witness would substitute for him, he knew something about the circulation. Now that question is raised and there is a dispute.

BY JUDGE MURPHY: I might just make this observation: Your "Exhibit No. 94" ——

BY MR. MARGIOTTI:

Q. Mr. Thomas ——

BY JUDGE MURPHY: Just a minute! The Court was in the midst of speaking to counsel. We said that your "Exhibit No. 94," which purports to be the story of Saturday Afternoon, June 12—there are two stories apparently that is directed to the Court's attention, one as to the Darcy murder trial and the other Judge Bo, er. I want to say to you that neither story is complete on the exhibit.

BY MR. RYDER: It is on "No. 95."

BY JUDGE MURPHY: All right, that is another number. All right, the stories, for the record, are complete apparently on "Relator's Exhibit No. 95."

BY MR. MARGIOTTI:

Q. During the month of October, 1948—during that entire month did you publish the circulation of your newspaper?

A. I am in no position to know that. I do know they were usually published the first week in October. I had nothing to do with circulation other than last night Mr. Thompson informed you where to find it in that book and that is what we have done.

(226) BY MR. MARGIOTTI: Your Honor, may I have the witness come down here? Here is a paper of October 6, 1948, the circulation appearing—what is apparently a sworn statement—to be 5,329.

BY THE WITNESS: That would be correct, sir.

BY MR. MARGIOTTI: Is that sufficient, Your Honor, on the question of circulation?

BY JUDGE MURPHY: We don't know; it is your case.

BY MR. MARGIOTTI: I think it takes Mr. Thompson.

BY JUDGE MURPHY: Well, we are here to hear.

BY MR. MARGIOTTI: What is that?

BY JUDGE MURPHY: We are here to hear.

BY MR. MARGIOTTI: I will have to call Mr. Thompson back.

BY THE WITNESS: I might explain that he asked me last night after he had been excused to be sure and not forget the page number of the circulation and I forgot it until I looked it up between and during this recess right now.

BY JUDGE MURPHY: Who was your editor at the time of the Darcy trial?

BY THE WITNESS: George Thompson today you mean ——

BY JUDGE MURPHY: (227) At the time of the Darcy trial.

BY THE WITNESS: We had a couple of them died.

BY JUDGE MURPHY: What was that?

BY THE WITNESS: I think George S. Hotchkiss.

BY JUDGE MURPHY: Do you remember whether he was editor December 27, 1947?

BY THE WITNESS: Yes he was.

BY JUDGE MURPHY: The day at Feasterville.

BY THE WITNESS: That is right.

BY MR. VAN ARTSDALEN: If it will facilitate the trial we are willing to agree that the circulation as of the date that was stated by Mr. Margiotti was the circulation.

BY JUDGE MURPHY: That certainly helps. That is what we were waiting for. The next order of business.

BY MR. MARGIOTTI:

Q. You have been asked ——

If Your Honor please, at this time we wish to introduce "Relator's Exhibits Nos. 34 to 106" so ——

BY MR. VAN ARTSDALEN: I object for the reasons stated to "Relator's Exhibits Nos. 12 to 33."

BY JUDGE MURPHY: (228) We will receive the exhibits. We understand there is no objection to them except they are not the originals, is that it? You are not objecting to them because they are not the originals: you are objecting to them as incompetent, irrelevant and immaterial.

BY MR. VAN ARTSDALEN: That is correct.

BY JUDGE MURPHY: We will receive them for whatever they are worth and the photostats in place of the originals.

BY MR. MARGIOTTI:

Q. Now you have testified under cross-examination that the Darcy testimony was about the same?

A. The what?

Q. The Darcy and Zietz-Foster testimony was about the same.

A. To my recollection, I mean ——

Q. In general ——

A. In general from the notes I followed from the previous trials, details.

Q. Did your paper publish the testimony of the trial of Foster-Zietz?

A. Oh, I am quite sure we did. I wrote it. I don't know whether it was published or not.

Q. Did you write it verbatim question and answer or on a query basis?

A. Certain times of day I did. Certain days we were meeting a deadline we wrote question and answer. We have a paper going to press at noon time. I went back to the office and wrote news at night.

Q. You gave impressions of what the testimony was in Court?

A. That is right.

(229) Q. Will you state how many issues you had at that time?

A. One edition.

Q. One edition. What time?

A. About 1:30 in the afternoon.

Q. And you conducted yourself in a manner that you have indicated in reporting the entire Zietz-Foster trial?

A. I think so.

BY MR. MARGIOTTI: Your Honor, I want to know something about the death of Webster Achey.

BY THE WITNESS: As I understand, we were told here his death was January 31, 1953. That is subject to verification.

BY JUDGE MURPHY: January 31, 1953?

BY THE WITNESS: January 31, 1953.

BY JUDGE MURPHY: Is that Judge Boyer or Mr. Achey?

BY THE WITNESS: This is Mr. Achey. That appeared in the newspaper as of that time.

BY MR. MARGIOTTI: May we establish Judge Boyer's death?

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Thomas, I show you "Relator's Exhibit No. 2," being a copy of the Bill of Indictment. Now then on the list of witnesses on "Relator's Exhibit No. 2" there appears the name of G. F. (230) Carfagno. Do you know G. F. Carfagno?

A. I do.

Q. Is he a Pennsylvania State Policeman?

A. He was at that time. I think he is now.

Q. There appears the name of K. R. Dane. Do you know K. R. Dane?

A. Yes sir.

Q. Was he a Pennsylvania State Policeman at that time?

A. He was.

Q. There appears the name of William A. Arner. Was he a Pennsylvania State Policeman at that time?

A. He was at that time. I don't know whether he is now.

Q. There appears the name of R. D. Evans. Was he a Pennsylvania State Policeman at that time?

A. He was.

Q. There appears the name of G. M. Sauer. Was he a Pennsylvania State Policeman at that time?

A. He was.

Q. There appears the name of Anthony Russo as Prosecutor. Do you know what his position was?

A. He was County Detective, now deceased; Chief County Detective.

Q. There also appears the name of Lieutenant Jack Hanlon. Do you know whether or not he was a police officer in the City of Philadelphia at that time?

A. That is right; in Philadelphia.

Q. There also appears the name of Sergeant Patrick J. Ken-

neily. Do you know whether or not he was a police officer in the City of Philadelphia at that time?

A. That is right.

Q. Do you recall whether all of those persons were called as witnesses at the Darcy trial?

A. I don't remember.

(231) BY JUDGE MURPHY: The transcript is there. There is no doubt about Hanlon being called. There is his testimony. But it is all there.

There appears a statement in the Doylestown Daily Intelligencer, Tuesday, October 7, 1947, as to the statement of the circulation in which the number of circulation is 5,297; is that correct?

BY THE WITNESS: Is that the same one we had over there?

BY JUDGE MURPHY: No; October 6, 1948—October 6, 1947.

BY THE WITNESS: This is correct. They are both different.

BY JUDGE MURPHY: Not much difference in numbers.

BY MR. VAN ARTSDALEN: We will stipulate now we agree to that.

BY JUDGE MURPHY: The circulation apparently increased 32 in a year.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Do you know whether these officers whose names were called to your attention were also rendering police duty in maintaining order during the trial besides being witnesses?

A. I don't know about that. I don't think they all were.

Q. You don't think they all were. Were some of them?

(232) A. I think a lot of those officers were witnesses, nothing to do with keeping order.

Q. All right. You have mentioned there were a lot of officers that were maintaining order?

A. You misunderstood me. There were some officers there. There weren't a lot of them.

Q. There were some officers there. You said they did a pretty good job?

A. That is the Sheriff and his deputies and Troopers who guarded the prisoner. That is what I meant.

Q. Were there other officers there maintaining order than the ones called to your attention by the District Attorney?

A. I think so. I am quite sure of it but I don't know who they were.

BY MR. MARGIOTTI: I think that is all. Thank you very much.

(Witness excused.)

MR. WILLIAM LESTER TRAUCH, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Trauch, where do you live?

A. Doylestown.

Q. What do you do?

A. I work for the Doylestown Daily Intelligencer.

Q. In what capacity?

A. Reporter.

Q. Did you cover—strike that. I show you "Relator's Exhibit No. (233) 94." I call your particular attention to a story appearing in the left hand column headed: "Judge Boyer Warns That Bucks County Is Tired Of Thieves From Phila."

A. Yes sir.

Q. And I show you a continuation of that story on "Relator's Exhibit No. 95," a continuation of that story.

A. Yes sir.

Q. Will you state whether you wrote that story?

A. Yes sir.

Q. And your Mr. Thomas—will you state whether or not you quoted Judge Boyer in that statement?

A. I tried to, sir.

Q. And did he make the statements that you attribute to him?

A. I tried to—I don't take shorthand like Mr. Thomas. I tried to be as accurate and precise as I could.

Q. In your best judgment, would you say that was accurate?

A. Yes sir.

BY MR. MARGIOTTI: That is all.

BY JUDGE MURPHY: Whether or not the item about which the witness was questioned was contained in the Petition for Habeas Corpus at Pages 6 and 7?

BY MR. MARGIOTTI: Your Honor, it was contained therein and there is a reference to it in Footnote No. 8 at the bottom of Page 10 in the advance opinion of the Circuit Court.

BY JUDGE MURPHY: For the record that would be Page —203 F. 2d at 414, the (234) precise item; the footnote on Page 414.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Now, Mr. Trauch, you remember reporting this particular article, do you not?

A. Yes sir.

Q. Will you tell the Court, please, in what courtroom that hearing took place?

A. That happened in the grand jury room which is on the second floor in the court house and it was during a session of what we call plead-guilty court.

Q. Were any of the members of the Darcy jury present in the room at that time?

A. No sir.

Q. Was the Darcy trial going on at that time downstairs?

A. Yes sir.

Q. And that you know of your own knowledge?

A. Yes sir.

Q. Was Judge Keller in the room when Judge Boyer made these statements?

A. Judge Keller was not there.

Q. Where was he at that time?

A. He was down in Courtroom No. 1.

Q. Was he presiding at that time at the Darcy trial?

A. He was.

Q. Mr. Trauch, just to clear up one point, you have mentioned a grand jury room, that was used, was it not, as one of the courtrooms for trials on occasion?

A. Yes sir.

(235) Q. That is one of the two other courtrooms that you have referred to?

A. Yes sir.

Q. That was held upstairs in an entirely separate room?

A. Yes sir.

Q. Would it be possible for any of the statements Judge Boyer made to be heard downstairs?

A. No sir. There were no spectators in that room.

Q. There were no spectators at that time?

A. No sir.

Q. Were you in and about the courthouse during the Darcy trial?

A. Yes sir.

Q. Did you observe any outbursts of any sort during the trial?

A. Absolutely none.

Q. Did you observe any mass demonstrations or demonstrations of any sort in and about the courthouse during the week of the Darcy trial?

BY MR. MARGIOTTI: We object, not cross-examination.

BY JUDGE MURPHY: The objection is overruled.

Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY THE WITNESS:

A. None at all, sir.

BY MR. VAN ARTSDALEN:

Q. Do you know—or did you observe during the course of the Darcy trial any disturbances in the courtroom?

A. None at all.

Q. Now that was during the period that you were in there?

(236) A. That is right.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Trauch, is your paper sold on the streets of the City of Doylestown?

A. It wasn't at that time, sir. We have had a change in management and things are different now.

Q. Will you state how it was circulated in Doylestown?

A. At that time we had a news agency and papers were taken down to the news agency and people went either to the news agency or to the office of the newspaper. We have no news place.

Q. And at that time how many news agencies had your paper for distribution?

A. You mean in Doylestown——

Q. In Doylestown.

A. One.

Q. Where was that located?

A. Do you know where the Doylestown Inn is?

Q. I know Doylestown very well.

A. Across from the Doylestown Inn, Kenny's News Agency.

Q. Do you know where the jury stayed during the Darcy trial?

A. It might have been the Doylestown Inn.

BY JUDGE MURPHY: Do you know?

BY THE WITNESS: I am sorry, sir, I don't.

BY MR. MARGIOTTI:

Q. The news agency is a public place where anybody can go in and (237) buy papers?

A. A regular newsstand, sir.

BY MR. MARGIOTTI: That is all.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Just to clear up a possible misunderstanding, Doylestown is a borough and not a city?

A. Yes sir.

BY JUDGE MURPHY: The Court will take judicial notice of the census figures of Doylestown. The Court has passed through there 1,000 times.

BY MR. VAN ARTSDALEN: That is all.

BY MR. MARGIOTTI: That is all.

(Witnessed excused.)

MR. A. RUSSELL THOMAS, recalled.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Thomas, are you acquainted with the method pursued by the newspaper in distribution of your paper in Doylestown, particularly in Doylestown, during the Darcy trial?

A. Well, as Mr. Trauch said, if you wanted to buy an Intelligencer you would buy it at the newsstand or come to the office, or if you subscribed for it it was delivered to your home.

BY MR. MARGIOTTI:

Q. All right ——

A. Not by the Intelligencer but by the news agency.

(238) BY MR. MARGIOTTI: That is all.

BY JUDGE MURPHY: It is now 4:13. We will ——

BY MR. LAWLEY: For the record, "Relator's Exhibits Nos. 94 and 95," only part of the article is contained in the Petition for Writ of Habeas Corpus, not the entire article.

BY JUDGE MURPHY: Is that true as to both references, those two articles?

BY MR. LAWLEY: I am referring to Judge Boyer's article.

BY JUDGE MURPHY: There is reference to two of Judge Boyer's. Which one?

Judge Boyer sentenced the boy from Philadelphia where he gave four to twelve months, according to the record. Then there is Judge Boyer taking the verdict in the Foster-Zietz case and making a statement. Which do you mean?

BY MR. LAWLEY: Sentence of the boy for robbery.

BY JUDGE MURPHY: Only part of that is in the Petition?

BY MR. LAWLEY: Yes sir.

BY JUDGE MURPHY: And only part of it is in 203 F. 2d?

BY MR. MARGIOTTI: I think that is correct.

BY JUDGE MURPHY: But as much as is in the Petition is in 203 F. 2d?

BY MR. MARGIOTTI: (239) Yes sir.

BY JUDGE MURPHY: The Court now adjourns until 10:00 o'clock tomorrow morning unless by accommodating counsel we can get one more witness.

BY MR. MARGIOTTI: I would like to call a doctor.

BY JUDGE MURPHY: The doctor has gone, hasn't he?

BY MR. MARGIOTTI: He had to fill some teeth.

BY JUDGE MURPHY: How long will it take?

BY MR. MARGIOTTI: Not long.

BY JUDGE MURPHY: All right, we will accommodate him.

We understand that three lawyers have been accommodated and a doctor and one newspaperman, and there is some gentleman there from the television station who has three youngsters. I hope we can get to him sometime or other.

DOCTOR CARL J. HOFFMAN, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Where do you reside?

A. At the present time in Philadelphia, Bristleton, 9500 Hillspeck Street.

Q. What is your profession?

(240) A. I am a physician.

Q. And where did you graduate?

A. Medical school——

Q. Yes.

A. George Washington, Washington, D. C.

Q. Will you state, Doctor, whether you are practicing your profession at this time?

A. Yes sir.

Q. Are you acquainted in Bucks County?

A. I was raised in Bucks County.

Q. Where?

A. Richburg.

Q. How far is that from Doylestown?

A. Seven to twelve miles. I can't say which way.

Q. Southeast—northeast?

A. More or less northwest. I am guessing at that.

Q. Do you recall of the killing at the Feasterville Inn?

A. Very well.

Q. And subsequent to that killing and prior to the trial of Foster-Zietz and Darcy, prior to those trials, were you in Bucks County?

A. Yes sir.

Q. What section of Bucks County did you visit?

A. Feasterville, Richboro, Newtown, Doylestown, spots in between.

Q. What took you into the County?

A. My family lives there. My wife's family lives there and many of my friends are in the Bucks County area and some of my patients were there.

Q. Will you state whether or not you had occasion to engage in conversations with persons in that County?

(241) BY JUDGE MURPHY: Do we have any assurance this is not going on for another hour? Are you waiving cross-examination?

BY MR. VAN ARTSDALEN: No sir.

BY MR. MARGIOTTI: I have no assurance.

BY JUDGE MURPHY: We are not going to have the clock get around to that situation. We will meet at 10:00 o'clock tomorrow morning. We understand the Doctor will be a com-

plete and thorough witness. We expect him to be and he should be treated accordingly. We thought it was just a matter of five or ten minutes, but it isn't. So until 10:00 o'clock tomorrow morning.

(Court adjourns for the day.)

(Court resumes on Saturday, March 13, 1954 at 10:07 A. M. with all parties, including the Relator, David Darcy, present in Court.)

DOCTOR CARL J. HOFFMAN, recalled.

DIRECT EXAMINATION (Continued).

BY MR. MARGIOTTI:

Q. Doctor, between the time of the killing in this case, which was December 22, 1947, and the date of the trial of the Darcy case, which I understand began on the 7th day of June, 1948, I want you to state whether you were in Bucks County.

A. Yes, quite a bit.

Q. Were you in there during the entire period or during part of that period?

A. Part of that period.

Q. Which part?

A. I can't recall the exact dates but I can put it this way: I was (242) stationed at Fort Hancock with the United States Disciplinary Barracks so that I would get into Bucks County still even at that time two or three times a week from the time of the killing up until April 3rd at which time I was discharged

from the Army and then I spent a good half of my time in Bucks County.

Q. Did you have a commission in the Army?

A. Yes, I did.

Q. What commission did you have in the Army?

A. I was a Captain in the Medical Corps.

Q. Were you honorably discharged?

A. Yes sir.

Q. Now then, I understand that from April 3rd on how much of your time did you say you spent in Bucks County?

A. A good half of my time was spent in Bucks County.

Q. During that period did you engage in conversations with citizens of that County and habitants of that County?

A. Yes.

Q. Did you engage in conversations concerning the Feasterville killing and Mr. Darcy?

A. Yes sir.

Q. With whom did you engage in these conversations?

A. People I knew in Bucks County, also the people I came in contact with; for example, we would go out for dinner either to Newtown or cut up to Doylestown, I may pass around and shop in Newtown—in fact I still bank in Newtown. I would go in the department store in Newtown or the bank and just casually talk to people, some of whom I didn't know by name, but in Bucks County when you are around you recognize faces and you talk or converse.

Q. From these conversations did you gain an impression concerning the sentiment existing in that County?

A. Yes.

Q. About the defendant?

(243) A. Yes.

Q. What was the sentiment as you found it?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Will you tell the Court just what experiences you had in meeting members of the public and tell what was said and the circumstances by which it occurred, so that the Court can determine what the sentiment was?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it subject to the objection.

BY MR. MARGIOTTI:

Q. Go ahead.

A. For example, if I went into a garage and asked for gas and had my car serviced the topic of conversation would come up as to the killing in Feasterville at least for a few minutes. Someone ——

Q. What was said?

A. Someone would say "They ought to be hanged" or "get the chair," or "Why bother with them?" They were the things that I recall most vividly in my mind. Now that would be apt to occur in any spot that we visited. It was the highlight of conversation in my travels through Bucks County, at least that part.

Q. And will you state whether or not that was the feeling generally found by you at some specific spot, some specific location in the County?

A. That was the feeling I found no matter where I was ——

(244) BY MR. VAN ARTSDALEN: I object and move that it be stricken.

BY JUDGE MURPHY: The objection is sustained; it will be stricken.

BY MR. MARGIOTTI:

Q. Did you find those expressions in more than one place?

A. I didn't get that question.

Q. Did you hear those expressions that you have enumerated in more than one location?

A. Yes.

Q. How many locations?

A. At least three.

Q. And where were these locations?

A. Richboro, Newtown, Feasterville.

Q. Did you get into Doylestown?

A. Yes.

Q. What about Doylestown?

A. I can't be as specific about Doylestown because our travels in Doylestown were limited to window shopping with the family.

Q. Will you state whether or not you heard any expressions relative to the city from which the defendants came from?

A. Yes.

Q. What were those expressions?

A. The idea of boys in Philadelphia coming into Bucks County. There appeared to be—we talked about the idea of them coming in.

Q. Well, can you tell me specifically what was said, rather than talking about the idea?

A. I can't recall the exact conversations, Mr. Margiotti.

Q. In substance.

A. Substance, yes. They considered them as gangsters and undesirable elements ——

(245) BY MR. VAN ARTSDALEN: I object and move that it be stricken.

BY JUDGE MURPHY: The objection is sustained. Tell what occurred.

BY MR. MARGIOTTI:

Q. Not what they considered them. What did they say? Don't give a conclusion but give what was said, the substance of what was said.

A. In using that word before, that word "gangsters" was mentioned.

Q. That word "gangsters" was mentioned?

A. Yes, it was.

Q. All right, tell us what was said about the "gangsters," the substance of the conversations. Don't give your own conclusions. That is what the objection is about.

A. All right, I see. "The boys were the gangsters . . ."—whatever terms was used, ". . . coming into Bucks County doing these crimes in Bucks County and they should have stayed in Philadelphia." That is as close as I can recall the substance.

Q. And was there anything else said in connection therewith?

A. I am not quite sure I understand your question.

Q. Was there any feeling expressed in connection therewith?

A. Yes.

Q. What was the feeling expressed in connection with the statement? What was the expression?

BY MR. VAN ARTSDALEN: I object.

BY THE COURT: We will take the question as amended.

BY THE WITNESS:

A. That is as to the expressions of the people ——

(246) BY MR. MARGIOTTI:

Q. Yes.

A. That—besides that the expression was that "There should be no mercy," and "We should throw them out."

Q. Should what?

A. "Throw them out."

Q. "Throw them out" of where?

A. That I can't say, I don't know. It was a term that was used.

Q. Will you state whether or not you were in Doylestown at any time during the week of the Foster-Zietz trial?

A. I don't recall because we went to so many spots. It is like trying to recall four or five weeks ago at a particular time. We would just as apt to be there as we would have to go into Newtown.

Q. Were you in Doylestown at any time of the week of the Darcy trial?

A. No.

Q. These sentiments, these expressions of sentiments, which you testified to, will you tell when they occurred with reference to the Darcy trial?

A. There were two main times; one was shortly after the incident in Feasterville, it was the height of talk at that time. Then again when on getting out of the Army in April there was occasionally—that would be the topic of conversation. But towards the end of May, the early part of June, that again was the highlight of conversation.

Q. Do you know what was going on towards the end of May or early part of June?

A. Yes. The trials began, I believe, in the last week in May and the Darcy trial was the one that followed.

BY MR. MARGIOTTI: (247) That is all.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Doctor, where is Fort Hancock?
A. Fort Hancock is located in New Jersey.
Q. Now, what part?
A. The northern part. It is a tiny tip ——

BY MR. MARGIOTTI: May I be excused for a minute?

BY THE WITNESS: It is a tiny tip of land sticking out into the part of New York, the harbor area.

BY JUDGE MURPHY: Mr. Margiotti, who is of counsel for the defendant, has asked the Court if he may be excused for a few minutes. Judge Pannell and another gentleman—there is another lawyer, his name was in the paper. Where is he? Isn't there another lawyer connected with the defense? The paper says there is. The paper says there is another lawyer connected with the defense. I want to show the defendant is adequately represented, and the defendant is here and at least we have Judge Pannell. According to the paper, there is another lawyer representing the defendant. There is another lawyer represent the defendant.

Are you a lawyer?

BY MR. LORENZO: No sir.

BY JUDGE MURPHY: Is there another lawyer connected with the defense?

BY MR. LORENZO: No.

BY JUDGE MURPHY: (248) They described you as a lawyer inadvertently.

At any rate, Judge Pannell is here to represent the defendant.

BY MR. MARGIOTTI: He is a lawyer in one county.

BY JUDGE MURPHY: If it is a question of personal inconvenience with Mr. Margiotti, we will await until he comes back. If he wants to transact business ——

BY MR. PANNELL: I know it isn't business.

BY JUDGE MURPHY: You mean he needs a personal recess?

BY MR. PANNELL: Yes.

BY JUDGE MURPHY: We will not wait for other reasons. We will take a five-minute recess.

(Recess)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

(Sidebar)

BY JUDGE MURPHY: Judge Watson was afraid you were ill and I didn't want to go ahead.

BY MR. MARGIOTTI: I was and I went to the toilet.

BY JUDGE MURPHY: It is O.K.

(End of Sidebar).

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(249) DOCTOR CARL J. HOFFMAN, recalled.

CROSS-EXAMINATION (Continued).

BY MR. VAN ARTSDALEN:

Q. Now, Doctor, where is Fort Hancock in relation to Philadelphia?

A. It is north of Philadelphia. It is approximately fifty or sixty miles from Philadelphia.

Q. How far is it from Doylestown, Pennsylvania?

A. Approximately sixty miles.

Q. And you were on active duty until April, is that correct?

A. That is right.

Q. And how many occasions did you come into Bucks County between December 22 and April when you were discharged from the Army?

A. At least twice a week besides weekends.

Q. At least twice a week besides weekends. What was your reason for coming into Bucks County on those occasions?

A. To see my family who I have spent very little time with up until that time for approximately four years.

Q. Where did your family live?

A. Most of the time with my in-laws in Churchville.

Q. Where was your family living between December 22 and April when you were discharged from the Army?

A. Both places. My mother-in-law was quite ill for a number of years so that my wife divided her time between her mother's home in Churchville and the home we were trying to put together in Philadelphia.

Q. How far is Churchville from Doylestown?

A. Actually in miles I am not certain. We have driven it often. I can make it in twenty-twenty-five minutes.

Q. Can you give us any estimate of the distance, sir?

A. I would say about fifteen miles, approximately that.

(250) Q. Do you have—did you know any of these defendants prior to the incident?

A. I did not.

Q. Did you know any of the family of these defendants prior to the incident?

A. I did not.

Q. Do you have any professional interest in this case?

A. No—now before I leave that answer set I want to be certain in what way. At one time I was asked to examine this boy to give an opinion but that was after a good many months after the case had been heard in Doylestown.

Q. When was that?

A. I don't recall the date. It was quite a while ago. It is in the records somewhere.

Q. You examined who—the defendant, David Darcy?

A. I examined the defendant, David Darcy, through a screen in the Doylestown prison with the permission of Warden Handy.

Q. Are you a psychiatrist?

A. I practice psychiatry and neurology.

Q. So that at that time you conferred with David Darcy in your professional capacity, is that correct?

A. That is right.

Q. Now, Doctor, you have brought to the Court's attention certain generalizations about conversations you heard. Can you be specific as to any particular conversation?

A. You mean like giving names of people ——

Q. Yes.

A. No, I can not.

Q. Can you be specific as to any particular time, any particular day or place?

A. Place, yes; date, no.

(251) Q. All right, the place. What place?

A. Richboro garage, Richboro general store, First National Bank and Trust Company, Newtown, Savage Bros. ——

Q. You mentioned various places. Can you recall any precise conversation that took place at any of those places?

BY MR. MARGIOTTI: I request the witness be permitted to finish his first answer.

BY THE COURT: Read the question and answer, Mr. Reporter.

(Question and answer read by the Reporter)

BY THE WITNESS: —the garage, there is a gas station in Feasterville. They are specific spots that I know. Then there could have been any of the little stores, little antique shops.

BY MR. VAN ARTSDALEN:

Q. Could have been. I am asking you about precise places.

A. As specifically as I can recall, those are the places.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter)

BY THE WITNESS:

A. There are several others come to my mind. Give me time and I will give you many more.

BY JUDGE MURPHY: Answer this one now. We have gone back there. Answer the question.

BY THE WITNESS: All I can recall is this: You go into the store, pick up your mail if it is there, you buy something at the counter, you talk to people you know and generally get into conversation (252) with many of them. It was a general conversation.

BY MR. VAN ARTSDALEN:

Q. I am asking you about precise conversations.

BY JUDGE MURPHY: Do you understand that question as a psychiatrist and neurologist?

BY THE WITNESS: He means names—

BY JUDGE MURPHY: He means do you remember any one conversation you had about this case or these cases?

BY THE WITNESS: Yes.

BY JUDGE MURPHY: The answer is yes.

BY MR. VAN ARTSDALEN:

Q. Will you tell us where a precise conversation that you recall took place?

A. One in the garage in Richboro.

Q. Can you give us the date or approximate date?

A. No, I can not.

Q. No approximate date at all?

A. Approximate date, yes; in the latter part of May.

Q. And do you know with whom you spoke?

A. That I don't.

Q. What was said?

A. He said that "It was a shame . . ."—something to this effect, "It was a shame we had this happen and they should be hung."

Q. Now, were you having a conversation with just one person at that time?

(253) A. No.

Q. How many people were there?

A. Three or four. There were always three or four around. It kept shifting.

Q. Were they persons that you knew?

A. Could have been.

Q. Who precipitated the conversation?

A. That I don't know.

Q. You say they could have been. In other words, you do not know whether they were people that you had known or not?

A. Not at this time I don't recall, no.

Q. And all that you can recall was "It was a shame we had this happen and they should be hung?"

A. Yes.

Q. And do you know to whom they were referring when they said that?

A. To the boys involved in the Feasterville killing.

Q. What brought on that conversation?

A. This: "What have you heard about the case?"

Q. Who said that?

A. I would say it many times.

Q. You would say it many times. In other words, you precipitated the conversation, is that correct?

A. Many times.

Q. Why did you precipitate these conversations?

A. Because if I didn't, someone else would.

Q. You were interested in the case, were you not?

A. I wasn't—I am sorry, I was interested in the case, yes.

Q. Of course, you were; and it was your interest in this case that brought about a great many of these conversations, was it not?

(254) A. That I don't know.

Q. You are still interested in the case, are you not, Doctor?

A. Yes.

Q. Now, Doctor, you testified, I believe, that you are not sure whether you were in Doylestown during the Zietz-Foster trial, is that correct, but you may have been?

A. That is right.

Q. You mean that it didn't—if you were in Doylestown it didn't make any impression upon you?

A. No, it isn't that, but in coming home—in coming home and traveling around Doylestown I don't recall the exact dates. It just as easily could have been there at that time. The interest was the same.

Q. At any rate, if you were in Doylestown during the Zietz-Foster case you observed nothing that particularly attracted your attention toward this case, did you?

A. What do you mean?

BY JUDGE MURPHY: The question is, Doctor, you a trained psychiatrist and neurologist, can you tell of one incident that you can recall in connection with any of these cases in Doylestown about the time of the trial? Do you understand the question?

BY THE WITNESS: I understand the question. I am trying to find out if he means a demonstration.

BY JUDGE MURPHY: Any incident that you can call to memory right now?

BY THE WITNESS: No.

BY MR. VAN ARTSDALEN:

(255) Q. You testified, I believe, you were not in Doylestown during any of the Darcy trial, is that correct?

A. Yes.

Q. Now then, Doctor, you wrote a letter at one time to the Board of Pardons, did you not?

A. Yes.

BY JUDGE MURPHY: I just want to say this to the Commonwealth: Of course, you can go far afield, if you desire, in cross-examination. The Mandate has come down restricting this Court to a narrow issue. We are not going to follow the usual rule. You can open the door and get us in right field where we don't belong. We belong on the diamond in a ball game—on the diamond in whatever it is. It is apparent at this minute that this matter appeared in the proceedings in the Petition. You are trying to get over to the Board of Pardons. In your opinion, he already has an interest. I want to say to you we have an issue of prejudice and hysteria at Doylestown at or about this time. The fact he appeared before the Board of Pardons would tend to show, so far as you view it, perhaps he is an interested witness. But we are not going to get into this psychiatric-neurologic phase which last stopped in Philadelphia.

You go ahead.

BY MR. VAN ARTSDALEN: I will be very brief.

BY JUDGE MURPHY: I don't mean for you to be brief.

BY MR. VAN ARTSDALEN:

Q. Now, Doctor, I show you part of the original record of the Petition filed in this case for a Writ of Habeas Corpus and show you in that Petition—in that original Petition filed in this (256) Court a photostatic copy of a letter which you wrote, is that correct?

BY MR. MARGIOTTI: In order that we may have the record clear on this subject, may we ascertain the purpose of the cross-examination?

BY JUDGE MURPHY: No, we have made our observation and your request for the moment at least is denied. Go ahead. Read the question, Mr. Reporter.

(Question read by the Reporter)

BY THE WITNESS:

A. Yes.

BY MR. VAN ARTSDALEN:

Q. And you did write that letter, sir?
A. Yes.
Q. Now in this letter ——

BY JUDGE MURPHY: Just a minute, please!

BY MR. VAN ARTSDALEN: Excuse me!

BY JUDGE MURPHY: All right, we ask you to state for the record what your legal purpose is in pursuing this line of inquiry.

BY MR. VAN ARTSDALEN: To attack the credibility of this witness, to show in that letter he made no reference to these alleged conversations he testified to.

BY JUDGE MURPHY: The letter speaks for itself and it is already before (257) the Court and the Court can read it and interpret it.

BY MR. MARGIOTTI: That wasn't the purpose ——

BY JUDGE MURPHY: We are not going to get on a side issue. We will be here on this long enough.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. You said you made a psychiatric examination of the defendant Darcy?

A. Yes sir.

Q. Now, may I ask when that occurred?

A. I don't recall the date.

Q. Would you look at that letter which the District Attorney has shown you to refresh your memory?

A. Not as to the date of the examination because I see many. I also see a great many people, and I had been seeing them for the City of Philadelphia, House of Correction, Holmesburg Prison.

Q. Would you look at the letter to see if there is anything in that letter that refreshes your memory as to the date of the examination?

A. No.

Q. Do you know if it was before or after the conviction?

A. It was after the conviction.

Q. Approximately how long after? Do the best you can.

A. Approximately two years.

BY MR. MARGIOTTI: That is all.

(258) BY MR. MARGIOTTI:

Q. I understood you to say in answer to a question framed by the District Attorney that you had an interest in the case?

A. Yes.

Q. What interest is that?

A. At the present time ——

Q. Yes.

A. My interest now is to try to correct what I think was a wrong.

Q. Is that interest other than the interest of a citizen, or do you have a personal interest?

A. As a citizen, a former resident of Bucks County.

Q. No personal interest?

A. Not at the present time no personal interest. I am not here for a personal interest.

Q. You were subpoenaed to come here?

A. Yes.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

BY MR. MARGIOTTI: Last evening we excused the news

writer by agreement. I don't want to say anything for the record without Mr. Ryder being here.

(Exhibits marked "Relator's Exhibits Nos. 107 to 111," inclusive)

BY MR. MARGIOTTI: If the Court, please, by agreement of the parties, subject to the approval of the Court, we offer in evidence "Relator's Exhibits Nos. 107 to 111," inclusive, and these are photostats of the Newtown Enterprise; which I understand is published at Newtown, Bucks County, Pennsylvania, the dates appearing thereon (259) beginning January 1, 1948 and ending June 10, 1948; and it is admitted that this is a weekly newspaper with a circulation of 1,972 all within a radius of five miles of Newtown, and that the 1,972 is the average circulation for twelve months preceding October 7, 1948.

BY MR. RYDER: The Respondent agrees ——

BY JUDGE MURPHY: What day of the week does the paper come out?

BY MR. MARGIOTTI: Thursday. They are all marked "Thursday."

BY MR. RYDER: The Respondent agrees to the authenticity of these exhibits "Nos. 107 to 111," inclusive, I believe it is; but we object to the introduction of them into evidence on the grounds they are incompetent, irrelevant and immaterial for the reasons stated with respect to the other exhibits yesterday of the same nature.

Now then, the Respondent agrees that the average weekly circulation for the twelve-month period prior to October 7, 1948 was 1,972; and that all of those were distributed within a five-mile radius of Newtown, Bucks County, Pennsylvania.

BY JUDGE MURPHY: The objection is overruled.

We have here, gentlemen, the issue of Thursday, January 4, 1948. Is there something here about the case?

BY MR. MARGIOTTI: Page 1, Column 7, Your Honor.

BY JUDGE MURPHY: Yes; all right. "Easy Xmas Money. . . ."

(260) BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: Go ahead.

BY MR. MARGIOTTI: We have a synopsis of the articles that appear in all these newspapers and where they are found, and for the convenience of the Court I would like to hand it up.

BY JUDGE MURPHY: It may help burning eyes out later on.

Have you a copy for the other side?

BY MR. MARGIOTTI: I think they are right in asking for one. We don't have one now.

BY JUDGE MURPHY: Suppose you take it in the meantime and check it.

BY MR. RYDER: We don't need it.

BY JUDGE MURPHY: Suppose you take it and check and save our eyes.

BY MR. RYDER: All right.

MR. JOHN J. KERRIGAN, called and sworn on behalf of the Relator, *on direct- and cross-examination, testified* as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Kerrigan, where do you reside?

A. Newtown, Pennsylvania.

Q. Where do you work?

A. Bristol, Pennsylvania.

(261) Q. By the way, how far is Newtown from Bristol?

A. I believe about fourteen or fifteen miles.

Q. I see. And in December 1947 and during the trial of Foster, Zietz and Darcy what were you doing?

A. Well, I at that time was in Wilmington, Delaware, employed as a reporter for The Journal every evening in that city.

Q. And did you ever come to Bristol in connection with some paper?

A. Yes, I did.

Q. When did you come to Bristol?

A. On September 1st of last year.

Q. Of this last year?

A. 1953.

Q. And what paper did you go with?

A. The Bristol Daily Courier.

Q. And in what capacity?

A. I am Managing Editor.

Q. And as Managing Editor do you have control of what is known as a morgue of the newspapers?

A. In a rather loose and general way, yes.

Q. You were asked to bring here the newspaper's files of the

Bristol Daily Courier's continuing issues thereof for and during the period beginning December 1, 1947?

A. I was asked to bring those, yes.

Q. That was by subpoena?

A. Yes.

Q. Have you brought them?

A. Those filed copies, those issues, and other filed copy issues of the Bristol Daily Courier were sent last summer, I understand, to a firm in Cleveland, Ohio, to be microfilmed and the microfilms are to be returned to the Courier and the filed copies are (262) to be destroyed, and that is being done very gradually. We do not have now the filed copies you are interested in.

Q. Do you have any microfilm at all?

A. We have some of the years 1910 or 1911, something of that sort.

Q. Nothing down there in your file?

A. Nothing.

Q. The reason ——

BY JUDGE MURPHY: What date did you ask the gentleman for—the day of the killing until the end of the trial?

BY MR. MARGIOTTI: December 21 ——

BY JUDGE MURPHY: Did you ask him to bring papers from December 21 until when?

BY MR. MARGIOTTI: For and during the period beginning December 1, 1947 and ending June 30, 1948.

BY JUDGE MURPHY: As I understand it, you do not have the original papers themselves?

BY THE WITNESS: No.

BY JUDGE MURPHY: Does the Bristol paper have a morgue?

BY THE WITNESS: In what sense?

BY JUDGE MURPHY: In the sense you cut out the news items and put them in (263) an envelope and put them away for future reference. Whenever you want to cover a future story you go to that morgue and you have background.

BY THE WITNESS: We have some parts of a morgue. We do not have a complete morgue.

BY JUDGE MURPHY: Did you have one on this case?

BY THE WITNESS: No sir, not that I know of.

BY MR. MARGIOTTI:

Q. Have you ever searched your files for the purpose of ascertaining whether you have the kind of record the Court indicated in its questions?

A. I have looked into that and learned generally that we do not have such a morgue record.

Q. Do you make it a practice to keep your morgue in the manner suggested by the Court, have an envelope for each story or each individual in your community and so on?

A. Going back for a period of two months, we do.

Q. Before that?

A. Before that there were some files kept, some records kept, but not on an envelope basis and not on the comprehensive basis that a real morgue calls for, in my opinion.

BY JUDGE MURPHY: Are you going to attempt to try to get the contents of the Bristol paper in, secondary evidence?

BY MR. MARGIOTTI: I don't think so. What I am trying to do—I understood (264) this situation—is to lay the evidence before the Court and then *in some manner in support* since it will be some time, I assume, before the Court rules on the matter ——

BY JUDGE MURPHY: I don't know. Don't make any suppositions.

BY MR. MARGIOTTI: I gathered that from the view to withhold your decision the other day on the other proposition ——

BY JUDGE MURPHY: Don't make any suppositions. Don't speculate.

BY MR. MARGIOTTI: If it is convenient when they get their microfilm back to introduce ——.

BY JUDGE MURPHY: What you want us to do is wait until some firm in Cleveland is finished with the microfilm and then you have produced for you the papers from December 1, 1947 to June 30, 1948, and then apparently without any examination of the papers to wait until there is an examination made and then if there is anything pertinent, for us to receive them.

BY MR. MARGIOTTI: I don't mean it that way. It is going to the extreme. I mean if it is convenient if the Court has not disposed ——

BY JUDGE WATSON: Couldn't we go on with evidence, some relevant testimony, in this case that is going to help the Court? This doesn't help us at all.

BY MR. MARGIOTTI: I disagree with you.

BY JUDGE MURPHY: (265) We understand if and as and when there is something in the Bristol paper that interests the Court, will we hold it open?

BY MR. MARGIOTTI: I wouldn't want you to hold it open for that purpose. If it is open, naturally then we will come in.

BY JUDGE MURPHY: If it is open and there is light, we always like to get light.

BY MR. MARGIOTTI: Yes.

Q. Mr. Kerrigan, will you state whether or not there is anybody in your firm that knows whether or not your paper carried the news of the Feasterville killing as well as the trial?

A. I believe there is a person who knows the answer to that question.

Q. Well, who would know that?

A. Well, I could think of several people.

Q. The most important person.

A. Mr. J. Paul Pettigoe, possibly.

Q. Now you were asked to bring records showing the records of circulation of the Bristol Daily Courier during the period that I have mentioned; you have that?

A. I have a printed copy of the sworn circulation statement for the twelve month period ending September 30, 1948, and that shows the circulation, the average circulation, for that period at 5,397.

Q. Is your paper a daily paper?

A. Yes.

Q. And do you know what time your paper went out on the stands or went out to subscribers?

A. I don't know precisely. I wasn't there. I could tell you (266) what I heard or what I believe to be the situation. That is about all.

Q. In general, how soon after your paper has been published?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained to that line of examination. The gentleman was in Wilmington, Delaware, and no way connected with the paper, good, bad or indifferent, at the time.

BY MR. MARGIOTTI:

Q. Who would know in your organization how soon after a paper is out and published and off the press it gets into the hands of the public?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We think this line of inquiry ought to be pursued outside of this courtroom. You want to know what witness you ought to subpoena. This is a matter for your investigator.

BY MR. MARGIOTTI: This witness has come here pursuant to a subpoena and we asked him when he was here and he didn't get it.

BY JUDGE MURPHY: We think this is an investigator's matter. This witness was down in Wilmington, Delaware.

BY MR. MARGIOTTI: That is all.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN: No questions.

(267) We move to strike out his entire testimony.

BY JUDGE MURPHY: Oh, let it there. More strokes for the Reporter to strike it out.

BY MR. VAN ARTSDALEN: That is all.

(Witness excused.)

MR. GEORGE A. KOEHLER, called and sworn on behalf of the Relator, on direct- and cross-examination testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Koehler, where do you reside?

A. Collingswood, New Jersey.

Q. From December 22, 1947, to, say June 15 or June 20, let's say, 1948, where did you live?

A. Camden, New Jersey.

Q. What did you do during that last period?

A. I worked for WFIL Radio and Television in Philadelphia.

Q. Will you state whether or not your radio and television service covers Bucks County?

A. Yes.

Q. And will you state whether or not you have any—strike that. What was your position at the time at the station?

A. I was Promotion and Advertising Manager of the station.

Q. Will you state whether or not your station carried any news items of the Feasterville killing as well as the trials?

A. I can not so state definitely, no sir.

Q. Do you have any films or records pertaining to either the killing or to the participants?

A. I have some fragmentary films which I brought along, asked for (268) in the subpoena. We are required to keep our records only for five years for the Federal Communications Commission. We have no other records. I can not tell what appears on the films. I have the films with me. They may or may not relate to this.

Q. How many films have you?

A. I have two.

Q. Will you please produce them? (Witness produces films.)

Are these films for the radio or television?

A. Television.

Q. Do you individually recognize any of the persons in these films?

A. No sir, I do not.

Q. Do you remember having any record showing what was said by your Television Company in connection therewith?

A. No.

Q. Do you know whether they were shown by your Television Company?

A. They were shown on our television newsreel.

(Exhibits marked "Relator's Exhibits Nos. 112 and 113," respectively.)

BY MR. MARGIOTTI: These films, Your Honor, have been marked only for identification; one is marked "Relator's Exhibit No. 112" and the other is marked "Relator's Exhibit No. 113" only for identification.

BY JUDGE MURPHY: Is there any living person, so far as you know, as of this moment that knows anything about what is in those films?

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: Where is he?

(269) BY MR. MARGIOTTI: He is in the Court.

BY JUDGE MURPHY: All right.

BY MR. MARGIOTTI:

Q. Will you state what was the date of "Relator's Exhibit No. 112"?

A. 12/23/47.

Q. What was the date of "Relator's Exhibit No. 113"?

A. It is marked on the paper inside January 21, 1948.

Q. Do you have any other papers in connection with this matter, ads or otherwise?

A. I have a photostat of a story that appeared in the Philadelphia Inquirer that I was asked to bring.

Q. Let me see it.

A. I think it might clear something up—these are silent films although the photostat says sound.

BY JUDGE MURPHY: Are they the kind there is sort of a running commentary by the person on the station and then he puts the picture on the screen?

BY THE WITNESS: Yes, Your Honor.

BY JUDGE MURPHY: Do you have with you the running commentary?

BY THE WITNESS: No.

BY JUDGE MURPHY: Were you asked to bring it here?

BY THE WITNESS: Yes.

(270) BY THE COURT: Did you bring it?

BY THE WITNESS: No. We are not required to keep it after five years.

BY JUDGE MURPHY: So that what we have here is a film that appeared on the screen without a running commentary?

BY THE WITNESS: That is correct.

BY JUDGE MURPHY: A person almost has to own a television to keep up with things.

BY MR. MARGIOTTI: The paper which the witness has produced, being a photostat of the Philadelphia Inquirer which he says, is only marked "Relator's Exhibit No. 114" for identification.

(Exhibit marked "Relator's Exhibit No. 114.")

BY MR. MARGIOTTI: That is all.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Koehler, you don't know personally yourself whether any of these films relate in any way to the Darcy case?

A. No. I saw them before I came up here. I know what they are. I recognized only the late Mayor of Philadelphia, Bernard Samuel. Then I recognized none of the other persons.

Q. Are these full fifteen-minute films?

A. No. I would estimate the smaller reel ——

Q. "Relator's Exhibit No. 11?"

A. That is correct. —— runs probably fifteen or twenty seconds, and the other one runs probably one and one-half or two minutes.

(271) Q. And you say that you know that these were put on your television, is that correct?

A. Yes.

Q. Do you know what time?

A. No, I don't. The photostat states 8:00 P. M., but I am not certain.

Q. You don't know yourself?

A. No sir.

Q. How do you know they were put on at all?

A. Because they were in the file records, the only files we keep beyond five years, in the larger can for that date.

Q. You yourself have no recollection of having seen the films put on?

A. I do not.

Q. You don't have any way of knowing how many television sets were turned on at the time the film was shown, do you?

A. I could estimate but nothing beyond that.

Q. It would only be an estimation, is that correct?

A. Yes.

BY MR. VAN ARTSDALEN: That is all.

BY JUDGE MURPHY: It would be an estimation from the very statement and hope that it was a large number.

BY THE WITNESS: It wouldn't be a large number then, Judge.

BY JUDGE MURPHY: That was back in 1948. The concern would be what was the television reception in Bucks County? And certainly it is better—if they have anything better—the Crossley people (272) or the television people have any records—it might be a better situation, if it is helpful at all, than this gentleman's opinion of what the number of television viewers were in 1948.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Was your station strong enough to cover all of Bucks County?

A. Yes. My geography isn't very good. We had broadcast over a radius of fifty miles from Philadelphia.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

MR. WILLIAM A. LYNCH, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Lynch, where do you reside?

A. New Britain, Pennsylvania.

Q. What do you do?

A. I am a Station Manager of Radio Station WBUS, Doylestown.

Q. Located at Doylestown?

A. Yes, it is, sir.

Q. It is strictly a radio station?

A. Yes.

Q. No television?

A. No.

Q. Will you state during the time of the Foster-Zietz trial whether or not you broadcast any of the proceedings of that trial, or conclusion?

A. I can not state that I know that we did; I can only presume, sir.

(273) Q. How about the Darcy trial?

A. It would be the same there, sir. I might explain, if I may, that we had gone on the air May 20. I understand the Foster-Zietz trial started May 24, and since we are a very small station, a very small staff, I know we were very, very busy at that time and didn't have a full-time news writer to go out and cover a trial and the nature of the radio work we would not even—even now—have anybody a whole day to cover one trial. That is the nature of radio news.

Q. Where do you get your news when you do broadcast it?

A. Now we have a news writer and we subscribe to the Associated Press and work that age-old radio and television slogan, "Work over the competition," radio station and so on.

Q. Do you know whether or not there was any radio broadcast done at all, according to the records?

A. I could not say yes, there was, or I could not say no, there wasn't. I would assume that we did carry it.

Q. I think that is right.

BY JUDGE MURPHY: Have you any more questions?

BY MR. MARGIOTTI: All right, cross-examine.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Your radio station had gone on ——

BY JUDGE MURPHY: Are you going to ask questions when the gentleman says all he can do is indulge in a presumption?

BY MR. MARGIOTTI: Assumption.

(274) BY JUDGE MURPHY: Presumption first, assumption second; and he hasn't assumed or presumed, so there is no evidence so far.

BY MR. VAN ARTSDALEN: No questions.

(Witness excused.)

MR. WALTER SCHROEDER, recalled.

RE-DIRECT EXAMINATION (Continued).

BY MR. MARGIOTTI:

Q. Mr. Schroeder, did you bring with you the minutes of the Court of Quarter Sessions, Oyer and Terminer?

A. Yes sir, I did.

Q. And in these minutes do you find—is there a reference to the term of court, what is meant by the term?

A. The term of court is the term of court that is designated on a calendar that the court puts out the beginning of any specified year. In 1948 the term of court started on May 18, 1948 when a grand jury was summoned to appear.

Q. How long did that term run?

A. That term would run to the next grand jury summation, which would be in September 1948.

Q. Then your terms ran about every month with the exception of during the summer months, and the May Term extended to September, is that it?

A. That is true.

Q. Now these minutes that you have produced are the minutes of the Zietz-Foster trial as well as the Darcy trial, is that not right?

A. Yes sir; they cover that period.

Q. Yes. These minutes show whether or not Judge Boyer presided with (275) Judge Keller during the Darcy trial?

BY MR. VAN ARTSDALEN: I object. The record speaks for itself.

BY MR. MARGIOTTI: First, I want to know the question. Then if they do——

BY JUDGE MURPHY: The objection is sustained. We think the investigation ought to take place elsewhere than in Court. The best evidence so far is the transcript itself that is before us, and it shows Judge Boyer on the bench or in consultation at sidebar. If the question is is there some minute in that showing that, we will permit the witness to answer if he knows.

BY THE WITNESS: I don't know.

BY JUDGE MURPHY: I might say that it may help to bring this matter to a head that the minutes that are already introduced in evidence of the Foster-Zietz case show Judge Boyer and Judge Keller sat on the first day—on the first day of the Foster-Zietz. Judge Boyer started, then it shows the day the confession was up Judge Boyer and Judge Keller sat through the Zietz case; then it shows Judge Boyer and Judge Keller sat the day the Darcy case started; it then shows Judge Keller sitting each day after that; then it shows one day apparently when Judge Keller and Judge Boyer sat together again. That is what the minutes show that have been introduced so far.

BY MR. MARGIOTTI: These minutes seem to show they sat together other days during the trial.

(276) BY JUDGE MURPHY: If they do, then we will go into it.

BY MR. MARGIOTTI: I am satisfied.

I wish at this time to introduce in evidence the minutes strike that.

BY JUDGE MURPHY: We understand that counsel has

already said now he has some minutes that show a variance between the minutes already introduced in evidence as to the presence of Judge Boyer and Judge Keller together and we certainly want to see them if there are any.

BY MR. MARGIOTTI:

Q. What book is this?

A. It is a criminal minute book 1948-2.

(Exhibit marked "Relator's Exhibit No. 115.")

BY MR. MARGIOTTI: We have marked it for the purposes of identification only. It is "Relator's Exhibit No. 115."

If the Court please, at this time I offer in evidence Page 7 of the minutes, which is merely a reference to the case and the record of the case showing the results thereof; Page 8 of the minutes which shows the minutes for each particular day; and Page 9 thereof which shows that—the same thing and particularly shows that Judge Keller and Judge Boyer presided at 10:00 o'clock in the morning——

BY JUDGE MURPHY: What day is that now?

BY MR. MARGIOTTI: June 7.

(277) BY JUDGE MURPHY: June 7?

BY MR. MARGIOTTI: Yes.

——and there is nothing to show that there was any change in the personnel of the Court; on June 8 it shows the Court called at 9:30 A. M. with Judge Keller and Judge Boyer presiding——

BY JUDGE MURPHY: What time?

BY MR. MARGIOTTI: 9:30, Judge.

—— June 9, Court called at 10:00 o'clock A. M. with Judge Keller and Honorable Calvin S. Boyer presiding. It gives a record of the day and does not show any change in the personnel of the Court; June 10 we have the Court convening at 10:00 o'clock in the morning with Judge Keller and Judge Boyer presiding; June 11 it shows Judge Keller and Judge Boyer presiding without any change of personnel during the day; June 12 at 10:00 o'clock in the morning, Judge Keller and Judge Boyer presiding; the Court adjourned at 11:13 A. M. until Monday, June 14, 1948; June 14 Court called at 10:00 o'clock with Judge Keller and Judge Boyer presiding.

BY JUDGE MURPHY: I might say that the other minutes you put in are exactly the contrary.

BY MR. MARGIOTTI: I don't know that they are the contrary.

BY JUDGE MURPHY: Well, here they are, "Exhibit No. 4."

BY MR. MARGIOTTI: (278) Those are the minutes that they keep down there. I am not responsible for them.

BY JUDGE MURPHY: I just call it to your attention.

BY MR. MARGIOTTI:

Q. Who keeps this particular record?

A. One of the personnel in the Quarter Sessions office.

BY JUDGE MURPHY: I might say, sir, if you look into the practice of Court you will find that this Court runs minutes

that say on a certain day—and reports go to Washington—on certain days Judge Watson and Judge Murphy sat, but this is the first case we sat in the same case, in about one out of seven years. It may be those are general minutes saying on that day Judge Boyer sat in one courtroom and Judge Keller in another on different business. However, if it is on this case as such, then one minute book contradicts the other.

BY MR. MARGIOTTI: We propose to call some witnesses who were there and observed what went on. All we can do is present the records.

BY JUDGE MURPHY: Call the witnesses in view of the conflict.

BY MR. MARGIOTTI:

Q. Who made this particular record?

A. I don't remember. It is over six years ago. I can't remember whether one of the other personnel or I made it. I don't remember.

BY JUDGE MURPHY: Don't you have the practice in this Court you have minute sheets and somewhere in the Clerk of the Court's office you have a file that shows the original papers of what occurred there?

(279) BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: Now then, following that up, then later on when they have time they get the single sheets out on the typewriter, minutes accumulated for two or three weeks, get caught up, put them in bound form.

Do you have the original papers, or do you destroy them?

BY THE WITNESS: The papers from the actual trial I have them papers in my case over there. I will look to see.

BY JUDGE MURPHY: At least in Lackawanna County if you go to the Clerk's office and go to the file you will find some papers. Over in the Courts you will find some. Other courts give you an inkling of what is in that paper.

BY MR. MARGIOTTI: At this time I offer in evidence Pages 7, 8, and 9 of "Exhibit No. 115."

BY MR. RYDER: The offer is objected to on the particular ground the offer consists of original records of the Bucks County Court. It is also objected to on the ground it has not been properly proved.

BY JUDGE MURPHY: It certainly has not been properly proved. Here are records which would appear to contradict each other, and if they came from the same source, there ought to be proof of what actually happened. It would seem there would be some question whether they wouldn't conflict per se with the United States (280) rule that was changed as a result of what happened in this courtroom, business entries.

Your objection because of the original records, that objection is overruled in that regard. We will receive the book as is subject to the right to substitute in lieu thereof photostatic copies or certified copies of the contents of certain pages. Meanwhile the books remain in the custody of the Court. But we think there should be evidence to explain what counsel points out to me, an apparent variance between one court record and the other.

BY MR. MARGIOTTI: I agree with Your Honor, and if we can get that evidence we are going to introduce it.

BY JUDGE MURPHY: However, we will receive it for the time being subject to the objection so that the Court can examine it to see if we can bring order out of what would seem to be minor chaos.

BY THE WITNESS: I had these original papers on the 11th. When I was summoned I brought them in. I brought them in as I was directed on that day.

BY MR. MARGIOTTI:

Q. What is the difference between the docket entries and the minute book?

A. The docket entries are more of a complete summation of the whole particular case than what the minute book is. The minute book is a matter that takes into consideration listing of cases, dispositions and any other matters in the way of orders, termination of any case handled in the Court of Quarter Sessions on any particular day.

(281) BY MR. MARGIOTTI: May I ask you this: In that exhibit, the last exhibit of the minutes, there is a reference frequently the court convened at a certain hour with Judge Keller and Judge Boyer presiding. That was during the Darcy trial. Now, what does that refer to?

BY THE WITNESS: It means that at the convening of court every morning we enter on the minutes that both judges were present on the bench at that time.

BY JUDGE MURPHY: Assuming you have a murder case and on the opening day the both judges sat and then one judge goes on with the murder case, is it the practice in your court for both judges, notwithstanding there is only one judge handling the case, to come in and sit in open court?

BY THE WITNESS: Both judges open court and one judge will be assigned to his courtroom and if he has a case going he will leave and go upstairs.

BY JUDGE MURPHY: Assuming he is assigned to the case taking a week, do they still open court each day notwithstanding the other case is going on?

BY THE WITNESS: They have a general opening every morning at 10:00 o'clock.

BY JUDGE MURPHY: Even though one judge is assigned to the case you have an opening with both judges each morning in your County?

BY THE WITNESS: (282) That is correct.

BY JUDGE MURPHY: They still do it?

BY THE WITNESS: Yes sir, they do.

BY MR. MARGIOTTI:

Q. Then let's take, for instance, here on June 7 where your notation is at 10:00 o'clock Judge Keller, President Judge, and Judge Boyer presiding. What does that mean?

A. It means on that particular day at the convening of court they were both sitting on the bench.

Q. And if either one of them left during the day, would you record that the judge left the bench?

A. We would have it recorded in our general criminal docket that that judge was sitting on the case on that particular day other than the entry that you might read in that minute book. I can show you a list that period covers where one judge pre-

sided at a jury trial during the time this murder case was going on.

Q. Here, for instance, let's take this one day; I want to get the formula. "Court called at 10:00 o'clock A. M. Honorable Hiram H. Keller, President Judge, and Honorable Calvin S. Boyer presiding." You say that means they were both there at the opening of court?

A. That is right.

Q. All right. Now "Eo Die . . ."—meaning same day, ". . . Court recessed at 12:02 until 1:30 o'clock P. M." Where were these two Judges, according to this record, between 10:00 o'clock, when they convened, and 12:02—according to this record?

BY MR. VAN ARTSDALEN: I object. The record should speak for itself.

(283) BY JUDGE MURPHY: Is there anything to indicate where they were?

BY MR. MARGIOTTI: There is not.

BY JUDGE MURPHY: Do you know where they were back in 1948 between 10:00 o'clock and 12:00 o'clock?

BY THE WITNESS: I do not know. I can find it in the other docket whether one Judge was sitting on another case or not.

BY MR. MARGIOTTI:

Q. You can find that out. Which docket?

A. Filed cases followed up before final minutes are in there. For instance——

BY JUDGE MURPHY: I might say that what the witness has said and what this record purports to show, according to counsel, is at variance with the docket entries and at variance with the transcript of the trial.

BY THE WITNESS: For instance, here on June 11, which, I believe, is a period during one of the murder cases, Judge Boyer is sitting in a plead-guilty matter in another courtroom. He opened up court that morning sitting with Judge Keller on the bench.

BY MR. MARGIOTTI:

Q. And can you tell us from this record what time he left Judge Keller and went to the other courtroom to take pleas?

A. No sir.

Q. Is there any record that would show that?

A. No, there isn't.

(284) BY JUDGE MURPHY: We might call attention of counsel to Page 1 of the book in question. It shows on May 25 some judge sentencing somebody to three months to one year—on May 25 while Zietz is on trial. May 24, court orders and directs Anthony Matteuci to pay the costs. Here's another one: Sentence suspended before Judge Keller on May 24. Here's May 26, plea of guilty in another case before Judge Keller. Here's—then they have a May 18 entry after May 27. The first entry is May 25; the second entry is May 24; the third entry is May 24; then there is May 18; then there is May 18; then the next one is May 24; then that goes over to June 11; then there is July 7. Well, we will go through it.

BY MR. MARGIOTTI:

Q. Mr. Schroeder, you said there was an envelope that con-

tained some original notes. Are those the original notes upon which you made your notations and from which you made your final notations in the record which His Honor now has before him?

BY MR. VAN ARTSDALEN: I object to the word "you."

BY JUDGE MURPHY: Did you make those notes in there in your own hand?

BY THE WITNESS: No, I didn't.

BY JUDGE MURPHY: Did you make those entries in this book in which you were questioned?

BY THE WITNESS: I don't recall.

BY JUDGE MURPHY: (285) The objection is sustained.

BY MR. MARGIOTTI:

Q. Will you state where you got those papers here before you?

A. I got them out of the original minutes that we had on file in our office for that particular term of court, May Term of Court 1948.

Q. Are those papers regularly kept in the business of that office?

A. Correct.

Q. Part of the records of that office?

A. That is right.

BY JUDGE MURPHY: I might say to you, sir, Page 7 offered in evidence the first item is dated June 28, 1948 and

refers to something—a case in 1946, and after the June 28 entry is a June 4 entry of 1948, a verdict of guilty in the Zietz-Foster case, and that is in between the June 28 entry and the June 14 entry and this is June 4 in the middle, which seems to conflict with the docket entries in the Darcy case.

BY MR. MARGIOTTI:

Q. I ask you now whose handwriting those notes are in?
A. I don't remember.

BY MR. MARGIOTTI: If the Court please, at this time we offer in evidence the papers which the witness has in his hands and which we will have marked, with the permission of the Court, for identification. I will state the purpose as soon as it is marked.

Will you just hand them to Mr. Butler?

(Exhibit marked "Relator's Exhibit No. 116.")

BY MR. MARGIOTTI: If the Court please, we now offer in evidence these (286) original sheets, which are part of the records of Bucks County and contained in the Clerk's office and are the sheets from which the various entries have been made, and these sheets will show that Judge Boyer presided with Judge Keller on June 7, June 8, June 9, June 11, and June 12—pardon me—June 7, June 9, June 11, and June 12.

BY MR. RYDER: The offer is objected to as incompetent.

BY JUDGE MURPHY: The objection is sustained.

The Court has before it the transcript of the proceedings of the Foster-Zietz trial. We have before us the proceedings of the Darcy trial, the actual stenographer's transcript, that was

offered heretofore by the Relator; the minutes or docket entries as to each trial; the transcript in the Darcy trial; and the docket entries and the transcript are both at variance with what the gentleman says is in the papers before him; and the book that was offered in evidence as "Exhibit No. 114," shows on Pages 8 and 9 starting with May 17 and over to June 14 Judge Boyer and Judge Keller presiding. The gentleman contends that is presiding at the same trial, so it has Judge Keller and Judge Boyer presiding at the Foster-Zietz trial throughout and at the Darcy trial throughout. In the same book it shows some judge sitting on a jury trial and taking verdicts in another case.

Until those minutes are further identified, we will take them subject to the objection so that they will be here for the Appellate Court.

BY MR. MARGIOTTI: May I add to my previous motion —my offer—June 14 also. I gave the dates when they presided together in the Darcy trial, (287) and he has given me June 14 too. I don't know but that the trial was over at that time.

BY JUDGE MURPHY: You have the evidence, according to this book, that they presided together at the same time that you have already offered the newspaper item with one judge in one court and one in another.

BY MR. MARGIOTTI: That could happen, presided together for awhile and one judge leaving the bench for awhile and coming back.

BY JUDGE MURPHY: No question about that. A lot of things could happen.

BY MR. MARGIOTTI:

Q. Mr. Schroeder, will you please look at your notes and tell us what they show about who presided at the Darcy trial on June 7, 1948?

BY VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We have taken the papers subject to the objection. The notes have been described as your notes. We take it it means your; they are notes which the witness said came from the Clerk's office which may or may not comprise all of the papers. They are what he found there and took here and prepared by somebody else of which he has no personal knowledge. We will take the answer subject to those conditions.

BY MR. MARGIOTTI:

Q. Did you hear what the Court said, Mr. Schroeder?

A. I heard part of it, not all of it.

Q. Tell us what it is as of June 7.

A. June 7, the clerk's sheet here on Indictment 37, February Term (288) 1948 ——

BY JUDGE MURPHY: Do you recognize the handwriting on the paper?

BY THE WITNESS: No, I do not.

BY JUDGE MURPHY: How many were working in the Clerk's office in June 1948?

BY THE WITNESS: There were—there was one woman by the name of Mattes; a man, Chief Clerk, Godshall; a Deputy Clerk, Wambold, and myself.

BY JUDGE MURPHY: Are they in your handwriting?

BY THE WITNESS: They are not in my handwriting.

BY JUDGE MURPHY: You don't identify the handwriting of any of your co-workers that any of those papers are in?

BY THE WITNESS: Well, from the general appearance it is a little difficult. They don't look similar to me. I am no handwriting expert. They look like Miss Mattes'.

BY JUDGE MURPHY: Is she living?

BY THE WITNESS: She is.

BY JUDGE MURPHY: Is she available?

BY THE WITNESS: I don't know. She has left the office. It looks like (289) her writing.

BY MR. MARGIOTTI:

Q. Whose writing?

A. It looks like Miss Mattes' writing.

Q. It looks like Miss Mattes' writing. All right, tell us what this shows as to who presided at the Darcy trial on June 7, 1948.

BY JUDGE MURPHY: Read exactly what the notes show.

BY THE WITNESS:

A. "1948 June 7—Court called at 10 o'clock A. M. Hon. Hiram H. Keller, P.J. and Calvin S. Boyer, J., presiding.

"Eo Die—The Defendant, David Darcy being present in

Open Court and being represented by his Counsel, Webster A. Achey, the District Attorney moves to have the Def. arraigned.

"Eo Die—The Defendant being arraigned the Crier reads the Bill of Indictment to the Defendant, to which the Defendant pleads 'Not Guilty' to be tried by 'God and My Country.'"

BY JUDGE MURPHY: Let me say the docket entries show the same thing, June 7, both judges were there. That is before he goes to a jury trial.

BY MR. MARGIOTTI:

Q. Now on June 8, 1948, look what is entered there for June 8, that is the next day.

A. "1948 June 8—Court called 9:30 A.M. Hon. Hiram H. Keller, P.J.

"Eo Die—Defendant, David Darcy being present in Open Court with his Counsel, Webster Achey and William Power. The Court directs the trial to proceed, and a jury to be sworn."

BY JUDGE MURPHY: We understand that the witness read there was only one (290) judge in that case. That is on the 8th. That is what the docket entries show.

BY MR. MARGIOTTI: That is right. I think we agree on that.

Q. June 9.

A. "6/9/48 Court Called at 10:00 A. M. D.S.T. Hon. H. H. Keller P.J. and Hon. Cal. S. Boyer J. Presiding. Court notices that Prisoner and his Attorney's are in the Court at 10:10 A. M. D.S.T. District Atty. Edward Biester opened his Charge to the Jury at 10:11 A. M. D.S.T."

Q. All right; June 10.

A. "6/10/48 Court Called 9:30 A. M. D.S.T. Hon. H. H.

Keller P.J. Presiding. Court notices that the Def. and Counsel are in Court. Wit. Corwin Hughes (S) Edward Wunsch (S) Winnie Lewtwyler (S) Frank Fronsdale (S). Court Recessed for 10 Minutes at 10:55 A. M. D.S.T. Court notes that the jurors are in their Places in the jury Box. Court notices that the Def. and his Attorney are in court. Wit Frank Fronsdale (Rec) Virginia Stickel (S) Elmer Waldeck (S) Maurice Phillips (S)."

Q. All right; June 11, 1948.

A. "6/11/48 Court called at 10:00 A. M. D.S.T. The Hon. H. H. Keller, P.J. and Calvin S. Boyer Presiding. Court notes that the Def. and Counsel are in Court. Wit: Dr. Charles Laycock (S) Dr. John C. Simpson (S) Alan Hellerman (S) (Court Grants the Witness to be Sworn in Wheel chair) Dr. Michael Scott (S) Court recessed for 10 Minutes at 10:57 A. M. D.S.T. Court conv. at 11:07 A. M. D.S.T. . . ."—I can't make the word out—". . . at 11:07 A. M. D.S.T. Court notes that the Def. and Counsel are in Court."

Q. Now, all right, June 12, 1948.

(291) A. "6/12/48 Court Called at 10:00 A. M. D.S.T. The Honorable H. H. Keller P. J. and Hon. C. S. Boyer Presiding. Court notes Def. and Counsel are in Court. Wit. Lt. John J. Hanlon (Rec) Def. Atty. objects to the oral statement #71 Objection over Ruled. Def. Atty call upon the Comm on Proof of the Said Document. Def. Atty ask for Proof of Oral Statement #73 Object. over Ruled by Court. Def. Atty object to Reading of the last part of the Document Objection sustained By the Court. Def Atty. Wants a Juror Removed as the testimony is not Relative of the case Court Over Ruled the objection Def. Excel . . ."—I don't know what it means. ". . . Wit: Keith R. Dane P.S.P. (Rec) Comm. Rest at 11:12 A. M. D.S.T. Def. Rest at 11:13 A. M. D.S.T. Jury Excused until Monday June 14 1948 at 10:00 A. M. D.S.T."

Q. Will you tell us what June 14 shows?

A. "6/14/38 Court Called at 10:00 A. M. D.S.T. Hon. H. H. Keller P.J. and Hon. C. S. Boyer J. Presiding. Court notes that def. and Counsel are in Court and jury in Box. Dist Atty Edward Biester started his Summations at 10:12 A. M. D.S.T. D.A. Edward Biester End his Summations at 10:56 A. M. D.S.T. Court Recesses for 10 Minutes at 10:57 A. M. D.S.T. Clerk notes that the Def and Counsel are in Court and jury are in there Seat. Def. Counsel Mr. Achey Starts his Plea to the jury at 11:06 A. M. D.S.T. Def Counsel closes Plea at 11:42 A. M. D.S.T. Comm. Waves the right to rebuttal. Prisoner remanded to Custody of Sheriff at 11:45 A. M. D.S.T. Court Recesses at 11:45 until 1:30 P. M. D.S.T. Jury in Custody of Proper officials. Court Conv. at 1:30 P. M. D.S.T. Clerk notes that the Prisoner and Counsel are in the Court at 1:30 P. M. D.S.T. The Court Stated his charge to the Jury at 1:31 P. M. D.S.T. Court Ended Charge at 2:38 P. M. D.S.T. 2 Alternate . . ."—

(292) Q. That is all. I don't care about the alternate jurors.

BY JUDGE MURPHY: We now have the situation where a paper prepared by someone to the Court unknown, has been read into the record and it shows on June 7, June 8 and June 12 agreement with the official transcript and the docket entries; on June 9, on June 10, on June 11 and June 14 the contrary, of the Court transcript and the docket. If that person is living and available who can throw light on the discrepancies—there is apparently a contradiction as counsel for the Relator, at least, interprets it, there is a contradiction of the official transcript and there is a contradiction of the official docket entries, both of which, we take it, went to the Supreme Court of Pennsylvania, both not speaking the truth, according to that paper there. There is a presumption of law ordinarily that court records are correct. There seems to be some conflict. It ought to be explained. We think the burden is on the Relator.

BY MR. MARGIOTTI:

Q. Here is two sheets written in pen and ink. Will you tell me if you recognize them?

A. I do not. They are not part of the official record.

Q. They are not part of the official record?

A. No, they are not part of the official record.

BY JUDGE MURPHY: How did they get there? Who put them there; do you know?

BY THE WITNESS: Most likely—I don't know.

BY JUDGE MURPHY: Did you bring them up here?

(293) BY THE WITNESS: Yes, I brought them up here.

BY JUDGE MURPHY: Where did you get them?

BY THE WITNESS: I got them in the office of Quarter Sessions and I gathered the papers from various sources and I might have misplaced a couple.

BY JUDGE MURPHY: These papers have something to do with something else?

BY THE WITNESS: I don't know.

BY JUDGE MURPHY: Where did you get them and why did you put them in the record?

BY THE WITNESS: I didn't put them in the record.

BY JUDGE MURPHY: Who did?

BY THE WITNESS: I put them in the envelope but I didn't consider them part of the record.

BY MR. MARGIOTTI:

Q. When you went for that envelope did you put these two papers in the envelope or did you find these in the envelope?

A. I found them with a number of papers in the Quarter Sessions office when I was trying to find this evidence. It has been circulating around for six years—pretty hard to estimate during the period, the time involved. And I tried to do as best I could (294) under the circumstances. The papers there I gathered up and I put them in by mistake.

BY MR. MARGIOTTI: I will show them to the Court.

Q. I am going to show you two other papers ——

BY JUDGE MURPHY: Just one minute, please! It looks like high-class doodling.

BY MR. MARGIOTTI: Judge, the only reason I called it to his attention is I didn't think it belonged in the envelope.

Q. And I am going to call your attention to two more papers and ask you whether or not they were in the envelope?

A. This is the first I noticed them. May I make an explanation?

BY JUDGE MURPHY: I wish you would explain this doodling and why you put it in this envelope.

BY THE WITNESS: Some of the papers have been before the various courts and they were over in the District Attorney's

office and in my haste to organize these various transcripts in regard to this case I had to go around different sections of the office of the District Attorney and so on in order to assemble these. I guess in my haste to bring this record, transcripts, up to the Court I grabbed ahold of some things—I grabbed ahold of some things by mistake.

BY JUDGE MURPHY: You took papers hither and yon and put them in with the same papers that should have been kept in the ordinary course of business—let me see the paper. The paper in question seems (295) to be talking about newspaper headlines, what the newspaper headlines had to say; then an item that "Darcy will know sometime today whether he will be the third boy-bandit to be scheduled for death or whether he will escape with life imprisonment." Then there is a description of Judge Biester's summation, and Judge Biester didn't become a judge for some months after and this describes him as a judge.

BY MR. MARGIOTTI: It shows whoever wrote that wrote it after Judge Biester was a judge and was making notes for his own purpose. I don't think it is part of the record. That is the reason I called it to the attention of the witness because, in all fairness, I don't think it should be in that envelope. I call that to the attention of the Court. The same thing applies to the two papers that is now in his hand.

BY JUDGE MURPHY: Is that part of the record?

BY THE WITNESS: I didn't have a chance to go over these papers until this morning. I didn't believe they would be submitted.

BY JUDGE MURPHY: Will you look at the paper in your hand? Would that be part of the record?

BY THE WITNESS: No sir, that would not be part of any record.

BY JUDGE MURPHY: Do you know if those two papers the Court read from were in that envelope when you took it to Scranton?

BY THE WITNESS: No.

(296) BY MR. VAN ARTSDALEN: I feel there is an explanation due to the Court on this matter. When these were shown to me they appeared to be in my own handwriting. I examined the papers which Mr. Schroeder now is being examined on sometime in the office of the Clerk of Quarter Sessions and apparently I left these notes here and inadvertently Mr. Schroeder picked them up. They are my personal notes and were made approximately a week ago.

BY JUDGE MURPHY: Are these your papers too?

BY MR. VAN ARTSDALEN: I don't know.

BY JUDGE MURPHY: Now here's a paper "Experienced attorney's opinion jurors which was most fair to the defendant."

BY MR. VAN ARTSDALEN: It is possible. I am not sure of that. I believe that was notes that were possibly made a short time ago by one of our County Detectives that was looking at the records.

BY MR. MARGIOTTI: May I hand him these two papers because they don't belong in the record?

BY JUDGE MURPHY: He already has them in his hand.

BY MR. MARGIOTTI:

Q. With reference to the papers that are left, is there any left that doesn't belong in that envelope, anything more of notes of yours?

A. This paper does not belong in there. It is from one of the ends of the transcript.

BY JUDGE MURPHY: (297) That doesn't belong in there; that is part of the transcript?

BY THE WITNESS: That is right. That is all that apparently belongs in there.

BY JUDGE MURPHY: In all fairness to the witness, so the Appellate Court will understand, this gentleman was in this Courtroom yesterday at adjournment time, at least we think, we recall seeing him in the room, at least we recall seeing him yesterday afternoon; and apparently he left here sometime yesterday afternoon or last night to accommodate defense counsel to comply with their request and went down to Doylestown, which is some geographic distance from this Court and returned and was here apparently this morning, and apparently the offices to which he tried to get access were closed. He was a busy man. So if he brought up other things, that may be an explanation.

BY MR. MARGIOTTI:

Q. Is there anything else in there that doesn't belong in that envelope that you know of?

A. No.

Q. What is that thing that you are sticking in your pocket?

A. That is a subpoena.

Q. Put it back in, Mr. Schroeder.

BY JUDGE MURPHY: Let's see it. There is a sinister implication there, probably not meant.

Is this the subpoena that you got which you were going to put into your pocket?

BY THE WITNESS: (298) Yes sir.

BY JUDGE MURPHY: Was it the subpoena that was served by the Relator?

BY THE WITNESS: Yes.

BY MR. MARGIOTTI: O.K. That is all.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Schroeder, was it not the practice in May and June 1948 at the opening of each session of court both in the morning and noon for both of the Judges to come in and sit on the bench?

A. That is true.

Q. And was it not also the practice at that time and still the practice that at both the morning and afternoon sessions the attorneys would hand up any miscellaneous papers they had to hand up in certain matters pertaining to Quarter Sessions, Oyer and Terminer, Common Pleas?

A. That is right.

Q. Isn't it also true very frequently, after the miscellaneous matters were heard the Court would split up or one of the Judges would go off the bench to attend other matters?

A. That is right.

Q. Is it not also true that in this minute book it describes that when both Judges came in and would sit on the bench at the opening session?

A. That is right.

Q. Now then, if one of the Judges went off the bench during the course of the morning or afternoon session, is it not also true the minutes would not show that?

(299) A. That is true.

Q. So that those minutes would only indicate whether both Judges came in at the opening session?

A. That is right.

Q. But one of the Judges might have left the bench at any of those periods of time and the minute book would not show that, is that right?

A. That is right.

Q. Now then, in the Oyer and Terminer Docket, which is "Relator's Exhibit No. 10," in that docket where it indicates as to a certain trial a certain Judge presided; is it not correct that that would indicate which Judge was actually sitting on the bench during that trial?

A. That would.

Q. Now, of course, Mr. Schroeder, I believe you testified yesterday as a matter of fact you were not personally in court during the Foster-Zietz or the Darcy trial, to your knowledge?

A. Just on business matters where I had to call somebody in the office for telephone calls or something of that nature.

Q. You were not the Clerk?

A. I wasn't the Clerk.

BY MR. VAN ARTSDALEN: That is all.

(Witness excused.)

BY JUDGE MURPHY: All right, we are going to recess

now until 1:30. At 1:30 we will return, then go to 2:30. At 2:30 we will adjourn. That is why we are taking—we will adjourn then until next week. We will fix a definite time next week when we will continue this proceeding. Recess until 1:30.

(300) (Recess.)

(Court resumes after the recess at 1:40 P. M. with all the parties, including the Relator, David Darcy, present in the courtroom.)

MR. HOWARD R. PRICE, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Price, where do you reside?

A. Presently at Charlottesville, Virginia.

Q. Did you ever live in Bucks County?

A. I did.

Q. When did you live there?

A. April of 1944 to December 29, 1952.

Q. I see. During that period did you live there continuously?

A. I did.

Q. And when you were living in Bucks County where did you live, Mr. Price?

A. From 1944 until 1951 I lived in Andalusia, Bucks County.

Q. And how big is that, Andalusia, approximately?

A. Oh, of course now it is larger than it was.

Q. How big was it then?

A. Oh, I would guess the population of Andalusia was between two and three thousand.

Q. I see. And what did you do; what was your occupation?

A. Salesman selling automotive parts, wholesale parts for cars, to automotive distributors in the area.

Q. Who were you working for.

A. William O. Cattle of Philadelphia.

Q. Will you state whether or not your duties as a salesman took you (301) out of Andalusia to various parts of Bucks County?

A. They did.

Q. What parts?

A. I had customers in Doylestown, Bristol and Sellersville and I traveled through the County in my work which would take me to Easton and other places north and west of the County.

Q. Did the time come that the killing at the Feasterville Inn came to your attention?

A. I am sorry, I didn't get that.

Q. Did the time come that the killing at the Feasterville Inn came to your attention?

A. Yes sir, it did.

Q. And how was it brought to your attention?

A. Initially by the newspapers.

Q. What newspapers?

A. The Bristol Courier to which we subscribed, the Philadelphia Bulletin and the Philadelphia Inquirer.

Q. Now after that time and until—strike that. Do you remember the Zietz-Foster trial?

A. Yes sir.

Q. And the Darcy trial thereafter?

A. Yes sir.

Q. After the killing was brought to your attention and up to the end of the Foster trial, will you state whether or not you continued your activities along the line that you have already indicated to the Court?

A. I did.

Q. And in traveling throughout Bucks County will you state whether or not you came in contact with citizens of that County?

A. I did.

(302) Q. And in these contacts will you state whether or not there were conversations with you, Mr. Price, and various citizens concerning the Feasterville killing and the defendants?

A. There were.

Q. And to what extent?

A. To a great extent.

Q. Did these conversations occur all over the County or some particular section?

A. Well, the area of the County where I spent most of my time due to the fact my chief customers were there were in Doylestown, Bristol and Sellersville.

Q. In those districts?

A. Yes; I heard mention made of it many, many times.

Q. In those conversations which you had with members of the public or citizens of that County, did the citizens have occasion to express their sentiments against the defendant Darcy as well as the others?

A. Yes sir——

BY MR. VAN ARTSDALEN: I object and move that the answer be stricken.

BY JUDGE MURPHY: The objection is sustained. Let the answer stand; sustain the objection.

BY MR. MARGIOTTI:

Q. Will you state whether there was anything said, no matter what you call it, concerning the killing and the defendants, particularly Darey, in these conversations?

A. Yes, those things were said.

BY MR. VAN ARTSDALEN: I don't believe that answer is responsive.

(303) BY JUDGE MURPHY: Well, so far as it adds any light at all, we will take it.

BY MR. MARGIOTTI:

Q. Will you state were there any opinions expressed to you by the men and women that you came in contact with?

A. Yes, many opinions adversely.

Q. Will you tell the Court in a general way just what was said to you, not your conclusions, but in general the substance of the conversations?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it subject to the objection.

BY MR. MARGIOTTI:

Q. Go ahead.

A. Well, I vividly remember the words, some of the words, that were said to me, that is at least in my presence. Some were directed to me and some were used in conversations in groups where I was present in various parts of Bucks County,

particularly the places I mentioned a short time ago, and the feeling was such ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained. What did you hear them say?

BY THE WITNESS: Why, I heard them say ——

BY MR. MARGIOTTI: Follow the Court's suggestion.

A. I heard them say that "the boys were from out of town, from (304) Philadelphia, they had no place there, they should be given Bucks County justice." I heard the words "lynch," "hang" and "shot" many times.

Q. In what respect did you hear the word "hang"?

A. That "all the boys involved in the Feasterville hold-up should be hanged, should be shot."

Q. In what respect did you hear the word "lynch"?

A. In the same respect.

Q. In what respect did you hear the word "shot"?

A. In the same respect.

Q. And did—will you state whether or not you heard the expressions up to and during the time of the trials?

A. Yes sir, I did.

Q. And what would you say were the number of persons in your travels that you engaged in conversations with on the subject such as you have related to the Court?

A. Well, I couldn't give the number numerically, but there were a great many due to the area I covered.

Q. How frequently would you make those tours that you have mentioned?

A. There was no routine because naturally I would cover the

area and most of the customers who were giving me the greater amount of business at that time ——

Q. Well, without a routine, about how often would you say you went to these various places that you mentioned?

A. Oh, some of those accounts I would see every month.

Q. What are you doing now, Mr. Price?

A. I am employed as the Territory Manager in the State of Virginia, the District of Columbia, parts of West Virginia, parts of the State of Maryland, parts of the State of Delaware for an automotive (305) replacement parts manufacturer in Toledo, Ohio.

Q. Are you a married man?

A. Yes sir.

Q. Do you have a family?

A. Yes sir.

Q. Do you have children?

A. Yes sir.

Q. How old are you?

A. I will be forty-five next month.

Q. And what education have you had?

A. I didn't graduate from high school.

Q. How far did you go in high school?

A. Two years.

Q. Mr. Price, don't answer this question until the Court tells you to, please. From the conversations—strike that. Did you read any other papers concerning the case other than the ones you have mentioned?

A. No sir; I only read those three.

Q. And during the trials did you read any other papers?

A. No other papers, no sir.

Q. Did you hear any comments by radio or television?

A. At that time at home we didn't have a television set but I do recall listening to radio reports at times.

Q. Was that during the trial?

A. Well, I am hazy on that. I don't know if it was during the trial.

Q. Well, from the conversations that you had with these people are you able—were you able to form an opinion in your own mind concerning the sentiment of the persons with whom you came in contact?

(306) A. Yes sir, I was.

Q. Will you state to the Court, please, what that sentiment was?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained. It may be considered—the question was will you state what the sentiment was? and if you mean for him to give the Court facts, we will hear all of the facts; if you mean for him to give a conclusion; characterize things he heard, the objection is sustained.

BY MR. MARGIOTTI: I mean for him to give his own opinion as to what the sentiment was from what he had heard.

BY JUDGE MURPHY: The objection is sustained but we will hear all the facts.

BY MR. MARGIOTTI: All right; that is in keeping with your previous ruling.

You may cross-examine.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Price, where were you born?

A. Philadelphia.

Q. And when?

A. 1909.

Q. You say you moved to Bucks County in 1944?

A. That is right. I believe it was April 1944.

(307) Q. Where were you living prior to that?

A. Philadelphia.

Q. Now Andalusia is in the far southeasterly tip of Bucks County, is that correct?

A. That is right.

Q. How far is it from Doylestown, Pennsylvania?

A. Between twenty and twenty-five miles.

Q. Now the first that you heard of this killing I believe you said was by the papers, is that correct?

A. I am quite sure that was so.

Q. Was that the Philadelphia papers or one of the Bucks County papers?

A. It, in all probability, would be the morning ——

Q. Do you know?

A. I am assuming it was the morning Inquirer.

Q. You are not sure?

A. I am not sure.

Q. Now, were you in Doylestown during the Foster-Zietz trial?

A. No sir.

Q. Were you in Doylestown during the Darcy trial?

A. No sir.

Q. Were you in Bucks County during either of those trials?

A. I was.

Q. These statements that you say you heard, can you recall who made any of those statements to you?

A. You mean by name ——

Q. Yes.

A. No.

Q. Did you know the persons to whom you were talking or from whom you heard those statements?

A. You mean do I know them personally ——

(308) Q. Yes.

A. No.

Q. Did you know them by sight?

A. Some of them I did.

Q. You had seen some of them before?

A. That is right.

Q. Can you portray or tell us any precise statement that was made at any time in any place?

A. Yes, I can.

Q. What?

A. At the ABC Auto Supply Co. in Sellersville during a discussion with a man on the counter and three or four of his customers, residents apparently of Sellersville, at least business men there in an automotive replacement parts business.

Q. They were persons in the store?

A. They were persons in the store.

BY JUDGE MURPHY: Time, please?

BY MR. VAN ARTSDALEN:

Q. Do you know when this was, sir?

BY JUDGE MURPHY: The month, year, approximately.

BY THE WITNESS: I believe it was prior to the trials.

BY JUDGE MURPHY: How long prior?

BY THE WITNESS: In the Spring of 1948.

BY MR. VAN ARTSDALEN:

Q. But you are not sure?

(309) A. I know it was in the Spring of 1948 but I am not sure of the month.

Q. Go ahead; you haven't finished the answer.

A. You want to know what I heard in the store ——

Q. Yes.

A. I heard this group of three or four or five persons discussing it and they said "that if they had anything to do with it they would see that the boys were lynched." There is one place I heard the word "lynched" mentioned.

Q. But you don't know that they had anything to do with it, do you?

A. I only know they were residents of Bucks County apparently from their talk.

Q. You don't even know that?

A. They intimated that; they said "coming into our County."

Q. Sellersville is where in relation to Doylestown?

A. West.

Q. West of Doylestown. How far west?

A. I can't recall that.

Q. You don't know how far Sellersville is from Doylestown?

A. I never drove from Sellersville to Doylestown.

Q. You are familiar with Doylestown, aren't you—Sellersville?

A. That is right.

Q. The roads of Bucks County?

A. Certain roads of Bucks County.

Q. I take it then you travel principally then on certain highways, is that correct?

A. That is right.

Q. Now, did you ever at any time see any demonstrations existing against any of these defendants?

(310) A. You mean physical demonstrations ——

Q. Yes sir.

A. Verbally only.

Q. Verbally only. And what was the nearest place in point of time to the time of the Darcy trial ——

A. I would say within a month probably.

Q. That you heard statements? You mean within a month prior to the Darcy trial you heard statements concerning the trial?

A. That is right.

Q. To whom did you first give this information, Mr. Price, that you have now testified to?

A. I gave information in a letter which I had notarized—in a statement which I had notarized.

Q. When?

A. I believe it was in January of this year.

Q. And to whom did you send the letter?

A. I gave it to a mutual friend of Inez Darcy—a mutual friend of hers and mine.

BY MR. MARGIOTTI: For the record, Inez Darcy is a sister of the defendant.

BY JUDGE MURPHY: We will take everything under oath. This witness will handle that.

BY MR. VAN ARTSDALEN:

Q. Do you know if Inez Darcy is a sister to the Relator?

A. She is.

Q. What was your purpose in giving this letter to the mutual friend?

A. Justice.

Q. Who was the mutual friend?

A. I. M. Minkoff, a prescription druggist in Philadelphia.

(311) Q. Was that letter sent in response to a request made to you?

A. Mr. Minkoff asked me of my opinions at the time and he asked me if I would put them in a letter and have that letter notarized.

Q. When did he ask you of your opinions?

A. December of 1953.

Q. In other words, it wasn't until December of 1953 that you ever told anybody about these alleged statements?

A. Oh, no. I discussed it many times—many years before that.

Q. Do you know what is Mr. Minkoff's address?

A. Yes, I do. It is on Sandro and Larch Streets in Philadelphia.

Q. He is a prescription druggist, is that correct?

A. That is right, registered pharmacist.

Q. Are you friendly with him?

A. He and I are friends.

Q. Now during the time from the shooting up until the time of the trial how much of the time were you in Bucks County?

A. Well, I lived in Bucks County.

Q. That is right, sir. But didn't your business take you out of Bucks County a great deal?

A. Well, I returned to my home more nights than I spent away from my home.

Q. These places that you visited in Doylestown, Bristol and Sellersville, how many places were there altogether?

A. I had one business account in Bristol, two in Doylestown and one in Sellersville.

Q. Would you make both calls in Doylestown at the same time when you were in town?

A. That is right.

Q. Now you have testified, I believe, that you went around to see your customers about once a month, is that correct?

(312) A. To the best of my recollection, depending on the customer.

Q. Were you in Doylestown, Bristol or Sellersville on any occasion from the time of the shooting up until the time of the trial except on business?

A. I don't know.

Q. These conversations that you gave here taking place in Bucks County, were they all while you were making business calls?

A. Those that I have related were when I made business calls.

Q. And who had precipitated those conversations?

A. Well, there were times when the conversation was already in progress when I would make my call.

Q. Can you remember any specific time when that occurred?

A. The time I related at Sellersville the persons were already talking when I walked in.

Q. The persons were already talking when you walked in?

A. Yes sir.

Q. How long did the conversation take place after you walked in?

A. I can't recall that.

Q. Do you have any idea?

A. No.

Q. Did all the men remain there while you were there?

A. Of course, in a place of business like that men will come and go, come to buy automotive parts and go out and others will come in.

Q. You are not sure?

A. That is right.

Q. It wasn't a regular meeting or anything of that sort, was it?

A. Just a discussion.

Q. By customers, is that correct?

A. That is correct.

Q. And you never saw or observed anything beyond speaking or verbal (313) statements in relation to this case?

A. Only verbal statements.

Q. On any of the occasions when there were conversations about these trials did you ever start the conversation?

A. I never did.

Q. You are sure of that?

A. I am positive of it.

Q. You never took any interest in the case prior to coming to trial?

A. I took interest but I did not start conversations.

Q. You did not start conversations?

A. No, I was there on business.

Q. Despite your interest in it, you did not attend either of the trials?

A. I did not.

Q. Was your interest in the cases because of your mutual friendship of knowing one—I withdraw that. Was your interest in this case because of any acquaintance or knowledge you may have had of Inez Darcy?

A. It was not. May I elaborate? At the time—at the inception of this I didn't know that Inez Darcy and David Darcy were brother and sister.

Q. Did you know Inez Darcy at the time of this shooting?

A. Vaguely, I did.

Q. All right. What is the name of your present employer?

A. A. P. Parts Corporation, Toledo, Ohio.

(314) Q. Can you give us their address?

A. 1801 Spellbush Avenue, Toledo 1, Ohio.

BY MR. VAN ARTSDALEN: That is all.

(Exhibit marked "Relator's Exhibit No. 117.")

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Price, I show you a sworn statement which you said you gave. Will you look at "Relator's Exhibit No. 117" and tell me whether that is it?

A. Yes, that is it.

Q. Did your wife sign a statement too?

A. Yes sir.

Q. You swore to it before a Notary Public?

A. Yes sir.

Q. Will you read it over?

A. Shall I read it aloud ——.

Q. No, no; just read it to yourself.

BY MR. MARGIOTTI: May the record show that we are exhibiting it to the District Attorney.

BY JUDGE MURPHY: Is Mrs. Price in Court?

BY MR. MARGIOTTI: I don't know.

BY MR. MARGIOTTI:

Q. Is Mrs. Price here?

A. No, she isn't.

BY MR. MARGIOTTI:

Q. She can come here, if necessary?

(315) A. If necessary.

BY MR. MARGIOTTI: If the Court please, the witness' credibility having been attacked, his statements having been

attacked in such a way as an inference drawn that his testimony is of recent fabrication, for the purpose of rehabilitating the witness on that account, for that reason we offer it as a consonant declaration, for that purpose only.

BY JUDGE MURPHY: The paper in question purports to be a statement by two people, one of whom is not in Court and subject to cross-examination. The paper in question in nowhere contains the expressions used by the witness on the stand and contains a series of conclusions contrary—I mean exactly the kind of conclusion which we ruled inadmissible in this trial.

BY MR. VAN ARTSDALEN: We object to the offer.

BY JUDGE MURPHY: The objection is sustained. However, for the purpose of the Appellate Court we will have the paper spread out on the record so they will have the facts before them, being a series of conclusions and nowhere are words used that were used in this hearing insofar as the word "lynching." "If they had anything to do with it they would see that the boys were lynched."

Did you anywhere in Bucks County at any time hear the word "lynch" except at Sellersville?

BY THE WITNESS: Yes sir, I did.

BY JUDGE MURPHY: Where else did you hear it? Can you name one person (316) that was present at the time you heard some discussion of lynching at Sellersville af the ABC? Can you name one person that participated in the lynching discussion?

BY THE WITNESS: By name, no sir, I can not.

BY JUDGE MURPHY: Who was your customer?

BY THE WITNESS: That was a branch of the ABC in Lansdale.

BY JUDGE MURPHY: Why were you there?

BY THE WITNESS: To make an inventory tool stop of their tools.

BY JUDGE MURPHY: For whom?

BY THE WITNESS: For myself.

BY JUDGE MURPHY: What company?

BY THE WITNESS: At that time one of the companies we represented was the Bond Tool and Forging Company in Allentown, Pennsylvania.

BY JUDGE MURPHY: So that you were there as a representative of the Bond Tool and Forging Company to take an inventory of what customer's tools?

BY THE WITNESS: (317) Of the ABC Automotive Supply people.

BY JUDGE MURPHY: Did you know any person there by name?

BY THE WITNESS: Well, the counter man—I knew their names at that time but I can't recall their names now.

BY JUDGE MURPHY: Well, on what other occasion did you hear the word "lynching" used?

BY THE WITNESS: I heard it at the service station in Andalusia.

BY JUDGE MURPHY: What was your occasion for being there?

BY THE WITNESS: I was buying gasoline.

BY JUDGE MURPHY: Who was it used the word "lynching"?

BY THE WITNESS: One of the other customers who come in there.

BY JUDGE MURPHY: Tell us what happened there. That is important. Tell us what happened. We want the details. When was it first, what month, your best judgment?

BY THE WITNESS: Well, I think that that was in the Winter of 1947-48.

(318) BY JUDGE MURPHY: The Winter?

BY THE WITNESS: That is right.

BY JUDGE MURPHY: Will you tell us whether it was after Christmas or before Christmas?

BY THE WITNESS: It was after Christmas.

BY JUDGE MURPHY: How long after—about?

BY THE WITNESS: I would say it was well into January.

BY JUDGE MURPHY: Well into January. You were in a gas station in some town—what town was it?

BY THE WITNESS: Andalusia where I lived.

BY JUDGE MURPHY: You were in a gas station in your home town?

BY THE WITNESS: That is right.

BY JUDGE MURPHY: What did you hear then?

BY THE WITNESS: I heard the word "lynch" mentioned.

BY JUDGE MURPHY: As best you can, give us its contents. What date?

BY THE WITNESS: Well, as near as I can recall, and I (349) can't recall the exact words because the word "lynch" is the word stood out in my mind ——

BY JUDGE MURPHY: Well, give us your best recollection.

BY THE WITNESS: To my best recollection, the statement was made "If this man had anything to do with it he would like to have the boys lynched"—to the best of my recollection.

BY JUDGE MURPHY: Did you know him?

BY THE WITNESS: No, he was a customer.

BY JUDGE MURPHY: Did you know anyone that was there besides yourself?

BY THE WITNESS: I knew the boy who operated the service station.

BY JUDGE MURPHY: What is his name? He was where he could hear the conversation?

BY THE WITNESS: No, he was not there at the time.

BY JUDGE MURPHY: Was there anybody there that you knew that heard this man say the word "lynch"?

BY THE WITNESS: No one that I knew by name, sir.

BY JUDGE MURPHY: Was Mrs. Price there? Was she with you in Sellersville?

BY THE WITNESS: (320) No sir.

BY JUDGE MURPHY: Was she with you in Andalusia?

BY THE WITNESS: At that gas station that morning ——

BY JUDGE MURPHY: Yes.

BY THE WITNESS: No sir.

BY JUDGE MURPHY: Where else did you hear the word "lynch"?

BY THE WITNESS: I can't give a definite location. Those are the only two I retained. I had reason to. One I did business with and the other did business with me. I can't recall exact locations—whether Andalusia or other parts of Bucks County. I can't recall that.

BY JUDGE MURPHY: The next one—the Court feels is highly pertinent—has not been covered. The Court has to wrestle with it. Where did you hear the expression "Bucks County justice"?

BY THE WITNESS: I believe I heard that at the same time I heard the word "lynch" at Sellersville. To the best of my recollection, that is where I heard it.

BY JUDGE MURPHY: Any other time?

BY THE WITNESS: At that particular place, that is the only time.

(321) BY JUDGE MURPHY: "Bucks County justice" you heard that once, apparently, at Sellersville where you heard the word "lynch"?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: You heard the word "lynch" at a gas station in Andalusia?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: What other term ——

BY THE WITNESS: "Shot" and "hang."

BY JUDGE MURPHY: Where did you hear the word "hang"?

BY THE WITNESS: I am sure one of the places I did hear it was at the post office at Andalusia.

BY JUDGE MURPHY: The post office at Andalusia. When?

BY THE WITNESS: Frankly, I can't place the time.

BY JUDGE MURPHY: Was it spring, winter or summer?

BY THE WITNESS: To the best of my recollection, it was warm weather.

BY JUDGE MURPHY: Warm weather. Now the post office at Andalusia, I suppose, is a small post office?

BY THE WITNESS: Yes sir.

(322) BY JUDGE MURPHY: Who was present then when you heard that said, the word "hang"?

BY THE WITNESS: You mean the names of persons by name ——

BY JUDGE MURPHY: If you know.

BY THE WITNESS: I didn't know either of the two or three persons talking in the lobby of the post office at the time.

BY JUDGE MURPHY: Well, it was some time when it was warm you went into the post office in Andalusia and you heard some two or three people and somebody used the word "hang," is that right?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: Now, to your best recollection, what did they say?

BY THE WITNESS: Well again I can't recall the exact words but it was on the lines that "they would hang them."

BY JUDGE MURPHY: Was it more than one person said it; was it all three said it; or what?

BY THE WITNESS: I can't recall that.

BY JUDGE MURPHY: Was your wife with you on that occasion?

BY THE WITNESS: No sir.

(323) BY JUDGE MURPHY: Did you hear the words "hang," "lynch," or "Bucks County justice" any place else?

BY THE WITNESS: I didn't hear the words "Bucks County justice" any place else.

BY JUDGE MURPHY: Did you heard the word "lynch" more than twice?

BY THE WITNESS: Yes sir, I did.

BY JUDGE MURPHY: Where?

BY THE WITNESS: I can't identify the location of those places.

BY JUDGE MURPHY: When?

BY THE WITNESS: I would also say it was during the warm weather in 1948.

BY JUDGE MURPHY: You have no idea where?

BY THE WITNESS: Well, I was in so many places in Bucks County I can't pin-point.

BY JUDGE MURPHY: The reason I am asking you is it is such an un-American and revolting word. This Court wants all the information we can get on it. And you are the witness. Where else between December 1947 and June 1948 did you hear the word "lynch" in connection with these boys?

(324) BY THE WITNESS: I can't give a definite geographic location in Bucks County.

BY JUDGE MURPHY: Did you ever tell anybody you heard the word "lynch"?

BY THE WITNESS: I am quite certain I did.

BY JUDGE MURPHY: Who?

BY THE WITNESS: I can't recall that.

BY JUDGE MURPHY: No one at all?

BY THE WITNESS: No; I spoke in general conversation to many persons.

BY JUDGE MURPHY: Did you ever tell anyone you heard the word "lynch" before you came into the courtroom?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: Where?

BY THE WITNESS: I discussed it when I was living in Bucks County.

BY JUDGE MURPHY: With whom?

BY THE WITNESS: That I can't recall—the names of the persons.

BY JUDGE MURPHY: That is all.

(325) We will have the letter spread in the record. We will sustain the objection but it is there for the Appellate Court to see.

Relator's Exhibit No. 117:

"#1

Mrs. Howard R. Price
1615 Westwood Road
Charlottesville, Virginia

January 9, 1954

Gentlemen,

We the undersigned, who were residents of Bucks County, Pennsylvania, from April 1944 to December 1952, would like to add our small voices to what we believe to be a miscarriage of justice.

The year 1948, when we were residents of Andalusia, Bucks County, is recalled very clearly. Many of our neighbors, acquaintances and friends were discussing the holdup of the Feasterville Inn, and of the trial of the boys accused of taking part in it. Their discussions were mostly based on reports they had read in the Philadelphia and Bucks County newspapers, and on local radio programs, that had reenacted the alleged crimes.

Local feeling was running extremely high, and prejudgment of the guilt of the boys named by the newspapers and radio stations, was made by many.

There seemed to prevail a feeling of unjust condemnation, engendered by the diligent persistence of the newspapers and radio stations, in their prejudgment of guilt of the accused.

So many of the persons with whom we (326) spoke were "#2
unreasonably vehement as they pronounced the guilt of all the boys named by the newspapers and radio stations.

Individual thinking had been molded into a mass belief of absolute guilt. We the undersigned feel strongly that a fair trial under these circumstances was impossible.

We still hold the belief that every accused person is entitled to a fair and impartial hearing. Due to the thinking of the people of Bucks County at the time of this trial, we do not think David Darcy could have received an unbiased hearing in the local courts.

Our plea is that this fair hearing be granted.

(Signed) Howard R. Price
(Signed) Nancy T. Price

Sworn to and subscribed before
me this Thirteenth Day of
January A. D. 1954.
(Signed) John B. Wightman
Notary Public
(Seal)
My Commission expires Jan. 6, 1957."

RE-DIRECT EXAMINATION (Continued).

BY MR. MARGIOTTI:

Q. Where did you hear the word "shoot"?

A. Well, I heard that many times but I can't pin-point that to geographic location.

Q. What was the substance of the conversation in which the word "shoot" was used?

A. Well, as I recall, that would follow the persons were saying "They would shoot the boys as a result of their coming

from Philadelphia into Bucks County and committing the crime."

(327) BY MR. MARGIOTTI: That is all.

BY JUDGE MURPHY: Did you ever report to the police that you heard people say they were going to lynch someone?

BY THE WITNESS: No sir, I did not.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Price, you have frequently referred to the word, the "boys." Did you hear the name Darcy mentioned in any of these conversations that you have just testified to?

A. I don't recall hearing any definite names other than the grouping of the four boys and the Feasterville Inn.

Q. In other words, you are not positive, are you, that they were referring to Darcy or to Foster and Zietz?

A. Well, their references, as I said, were to the four boys and the Feasterville Inn.

BY MR. VAN ARTSDALEN: That is all.

(Witness excused.)

Vol. II

TRANSCRIPT OF RECORD

(Pages 341 to 676)

Supreme Court of the United States

OCTOBER TERM, 1955

No. 323

UNITED STATES OF AMERICA, EX REL. DAVID DARCY, PETITIONER,

vs.

EARL D. HANDY, WARDEN OF BUCKS COUNTY PRISON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 15, 1955

CERTIORARI GRANTED OCTOBER 31, 1955

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BY MR. MARGIOTTI: I haven't seen the Mandate. I don't know if we are permitted to see it ——

BY JUDGE MURPHY: You don't know what is in the Mandate. Didn't you get a copy of it?

BY MR. MARGIOTTI: I did not.

(328) BY JUDGE MURPHY: Well, I am astonished ——

BY MR. MARGIOTTI: I just asked counsel for the Commonwealth and they said the same thing.

BY JUDGE MURPHY: I think I am learning some new law than I learned at Penn.

BY MR. MARGIOTTI: I think we should have had a Mandate.

BY JUDGE MURPHY: The Mandate is a public record. It has been on file from the date it came down and it is a public record and ——

BY JUDGE WATSON: I think you would have been interested in your victory.

BY MR. MARGIOTTI: I was.

BY JUDGE WATSON: You were not interested in the details of the victory ——

BY MR. MARGIOTTI: They never give me one of these.

BY JUDGE WATSON: They didn't give me one. I had to send down to the Clerk's office to get it.

BY JUDGE MURPHY: Apart from that, Mr. Margiotti, counsel in the case, has never seen the Mandate. That is the present situation.

We still have seven minutes to go. Who do you call, (329) gentlemen?

BY MR. MARGIOTTI: If Your Honor please, I have a motion to make.

If the Court please, I would like to move to amend the Petition for Writ of Habeas Corpus in this case to strike out, for instance, on Page 5 "That the hysteria and prejudice, which swept the town . . ." be stricken out and instead thereof to add in place of "the town," "the County."

BY MR. RYDER: We object to the amendment.

BY JUDGE MURPHY: Anything else?

BY MR. RYDER: It is rather late, it seems to me, to make such an amendment as that.

BY JUDGE MURPHY: Anything else, gentlemen?

BY JUDGE WATSON: Anything else?

BY MR. MARGIOTTI: That is the only thing I have, Your Honor.

BY JUDGE MURPHY: Well, we had agreed so that Mr.

Margiotti could leave at 2:30 to adjourn at 2:30, so we have consumed four of the minutes. There are only three minutes left.

BY MR. MARGIOTTI: I am willing to stay ten more minutes.

BY JUDGE MURPHY: I know you are.

The Court will now adjourn until 10:00 o'clock Tuesday (330) morning. The Court will take the motion under advisement. We will not sit on Monday because we have Argument Court, Call of the List and Grand Jury. We will start on Tuesday and we will go on until it is concluded and stay at it notwithstanding we have our regular work of Term of Court.

BY JUDGE WATSON: We are holding up the work on the Term of Court. We are giving every preference to this particular case.

BY JUDGE MURPHY: We hope from Tuesday on you will move a little more expeditiously.

(Chambers)

BY JUDGE MURPHY: On the 5th day of March 1954 an order was signed by this Court directing the Honorable Frank F. Truscott, Attorney General of Pennsylvania, by virtue of his office, to produce the person of David Darcy on Thursday, March 11, 1954 at 10:00 A. M. at the United States Court House at Scranton, Pennsylvania, there to remain until further order of this Court. It is now Saturday afternoon at 2:30 and the Relator has not completed placing his testimony upon the record, the Warden has asked the Court whether or not it is the Court's judgment that the prisoner should remain and be

lodged at the Lackawanna County Jail over the week-end in view of him having to be here on Tuesday morning instead of being returned to Rockview and then back Tuesday morning; and our judgment is that the order of the Court requires that he continue to remain at Scranton instead of being returned to Rockview and then returned back to Scranton. Is that clear?

(331). You have a Court interpretation to protect you and the order is there.

(End of Chambers.)

(Court adjourns for the day.)

(Court resumes on Tuesday morning, March 16, 1954 with all parties, including the Relator, David Darcy, present in Court.)

BY MR. MARGIOTTI: May I withdraw that motion which I made at the close of the last session for the reason I am going to present a motion in writing and under oath which I think is the proper way to do it.

BY MR. VAN ARTSDALEN: Yesterday afternoon a local doctor, Doctor Laundenslager, handed this envelope sealed to me and requested that I hand it to the Court. I believe it refers to one of the witnesses that was subpoenaed for counsel for the Relator.

BY MR. MARGIOTTI: If Your Honor please, while the certificate is not in proper form, I may state to the Court that Mr. Pannell tells me that this is a fact and, therefore, we are not going to question the contents of the certificate even though unsworn to.

BY JUDGE MURPHY: The record shows nothing so far.

BY MR. MARGIOTTI: That is right.

Your Honor, we have had some pictures taken of the courtroom in view of the fact that some witnesses will appear who will testify concerning the presence of Judge Boyer in the Court at the time of the Darcy trial as well as his location at various times. We think the pictures may be of help to (332) Your Honor, and for that reason I offer them in evidence and the District Attorney I think can state on the record what they show and I will agree to it without calling a photographer in the interest of saving time.

(Photograph marked "Relator's Exhibit No. 118.")

BY MR. VAN ARTSDALEN: We will stipulate that "Relator's Exhibit No. 118" is a photograph of the Courtroom No. 1 of the Bucks County Courthouse of Doylestown.

BY MR. MARGIOTTI: Does it show the main aisle coming from the outside entrance and approaching the bench and also shows to the right the six chairs of the jurors; is that right?

BY MR. VAN ARTSDALEN: That appears to be correct.

BY MR. MARGIOTTI: We offer it in evidence, Your Honor.

BY JUDGE MURPHY: It will be received.

BY MR. MARGIOTTI: Now "Relator's Exhibit No. 119"

(Exhibit marked "Relator's Exhibit No. 119.")

BY MR. VAN ARTSDALEN: That also appears to be a photograph of the Bucks County Courthouse Courtroom No. 1 at Doylestown, a view taken from the right-hand side of the

courtroom as the Court would sit and a view across toward the jury seats.

BY MR. MARGIOTTI: And showing the jury seats, is that right?

BY MR. VAN ARTSDALEN: It shows some of the jury seats, yes.

BY MR. MARGIOTTI: (333) Doesn't it show them all?

BY MR. VAN ARTSDALEN: It shows twelve jury seats.

BY MR. MARGIOTTI: It also shows places for spectators in the back.

BY MR. VAN ARTSDALEN: We will agree it shows in the back. Whether it is spectators or not, we will not say.

BY MR. MARGIOTTI: We offer it in evidence.

BY JUDGE MURPHY: It will be received.

(Exhibit marked "Relator's Exhibit No. 120.")

BY MR. VAN ARTSDALEN: "Relator's Exhibit No. 120" is another view of the same courtroom. That is all I can say. I think it will speak for itself where it was taken from.

BY MR. MARGIOTTI: Well, it shows the jurors' chairs that sat on the trial as well as the prosecution chairs and tables; does it not?

BY MR. VAN ARTSDALEN: Well, the defense counsel tables ——

Discussion

BY MR. MARGIOTTI: Which is the defense counsel tables?

BY MR. VAN ARTSDALEN: Right here. And also chairs and tables that are constantly used by the attorneys and members of the press.

BY MR. MARGIOTTI: Let's mark that what tables they are so that the Court can follow it.

(334) BY JUDGE MURPHY: On your "Exhibit 118" there are two rows of chairs there. What are those chairs for?

BY MR. VAN ARTSDALEN: Those rows of chairs, Your Honor, are for the members of the bar that are not trying the case, and the table is sometimes also used by members of the press.

BY JUDGE MURPHY: Then the two tables on the right on "Exhibit No. 118" as I face the picture would be over near the jury; that is counsel for the plaintiff and counsel for the Commonwealth?

BY MR. VAN ARTSDALEN: Yes sir.

BY MR. MARGIOTTI: The front one is the Commonwealth's; the rear one is the defense.

The District Attorney has marked what each table is, and "Commonwealth's Exhibit No. 120," which apparently is a picture taken from the—at about the front of the bench I would say—is that right—shooting toward the left——

BY MR. VAN ARTSDALEN: I don't believe that is quite correct.

BY MR. MARGIOTTI: Say shooting from the right of the bench toward the left ——

BY MR. VAN ARTSDALEN: Yes.

BY MR. MARGIOTTI: And shows the jury chairs as well as benches behind it ——

BY MR. RYDER: (335) You called it the Commonwealth's exhibit, Mr. Margiotti.

BY MR. MARGIOTTI: I called it "Commonwealth's Exhibit No. 120." I meant "Relator's Exhibit No. 120."

(Exhibits marked "Relator's Exhibits Nos. 121 and 122," respectively.)

BY MR. MARGIOTTI: We have one exhibit marked "Relator's Exhibit No. 122," Your Honor, which I would like to withdraw because quite apparently it is a duplicate of one of the ones that is already before Your Honor. May I withdraw it?

BY JUDGE MURPHY: Of course.

What about "Exhibit No. 121?"

BY MR. MARGIOTTI: We have agreed on "Relator's Exhibit No. 121," which shows the District Attorney's table, defense table, and it is taken from a position back of where the jurors sit—taken in just the opposite direction.

MR. WALTER SCHROEDER, recalled.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Now, Mr. Schroeder, when you were last on the chair as a witness you spoke of the White matter and the Court expressed an interest to ascertain whether or not there was any record about that White matter; do you recall that?

BY JUDGE MURPHY: (336) The White matter ——

BY MR. MARGIOTTI: The case that happened on the 12th of June.

You asked me if there was any reference to it in the record anywhere, and I am going to ask him if he knows.

BY JUDGE MURPHY: You mean on the sentencing day somebody from Philadelphia was sentenced, that his name was White; is that it?

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: You go ahead; we will rule.

BY MR. MARGIOTTI:

Q. Do you know what I am talking about, Mr. Schroeder?

A. No sir. I don't recall the statement made about Mr. White on any particular day while I was on the stand.

Q. Do you recall on June 12 Judge Boyer sentencing a young man named White from Philadelphia who had pleaded guilty to larceny?

A. Well, some of the records are here of that particular day. I had these dockets read. I didn't have a chance to look at it since I received the subpoena from him.

Q. What I have in mind—do you know of any records at all in your office where there is any reference to a remark made by Judge Boyer in connection with that case?

A. No sir. I looked over the record. This is the only record I have in the office.

BY MR. MARGIOTTI: That answers the question and I am through.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN: (337) No questions.

(Witness excused.)

MRS. ELIZABETH M. DEGAN, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mrs. Degan, where do you reside?
A. Up at Revere, Pennsylvania.
Q. During the year 1948 where were you employed?
A. In the Quarter Sessions Office in the County of Bucks.
Q. What was your occupation?
A. I was a clerk there.

Q. A clerk. And as a clerk did you have any duty in connection with either the Darcy or the Foster and Zietz trial?

A. Yes, I did.

Q. Will you state whether or not—state what those duties were.

A. Well, I docketed—I wrote the docket up, the entries of Court I went in Court ——

BY JUDGE WATSON: Won't the witness speak a little louder? It is difficult for me to hear and my hearing is very good.

BY MR. MARGIOTTI:

Q. Did you hear the Court?

A. I took down some of the entries that I docketed into our Court docket.

Q. Was that in connection with your duties?

A. Yes sir.

Q. I am going to show you an exhibit here marked "Relator's Exhibit No. 116." I want you to look at that exhibit. Take out the papers which are in there and tell me whether any of those (338) papers are in your handwriting.

A. Yes, they are.

Q. Will you tell me what is in your handwriting so that we can identify them?

A. Well, on the trial sheet I mentioned the Judge, the District Attorney, the defense attorneys, and during the trial I took down the jury as they were charged; I took down the beginning witnesses; I took down adjournment on one particular day here; then I took down some more jurors, adjournments, jurors, the arraignment of the defendant and adjournments. That's about all.

Q. In other words, all those sheets, irrespective of what they are, are in your handwriting?

A. Not all of these sheets. These aren't all in my handwriting.

Q. Will you eliminate the ones which are not in your handwriting?

A. You mean I should take them apart ——

Q. Hand them to me and we will work out some way of designating them for the record.

A. On some pages there is my handwriting and other handwriting. I mean I may have gone down a page and not quite finished it. It would be pretty hard to do.

Q. Let me take these white sheets out. They are attached?

A. Yes sir.

Q. I am calling your attention particularly to the yellow sheets and I am going to take a third yellow sheet, the first number at the top, with reference to who was presiding; do you notice that?

A. Yes.

Q. Whose handwriting is that?

A. I believe, sir, that is Mr. Godshall's.

Q. And who is he?

(339) A. He was the Clerk of Quarter Sessions at that time.

Q. I see. Is he here?

A. Yes sir.

Q. I am showing you another sheet marked "6/10/48." It has a reference as to who was presiding. Whose handwriting is that?

A. It looks like Mr. Godshall's.

Q. It isn't yours?

A. No sir.

Q. I show you another sheet marked "6/11/48" with reference as to who was presiding right at the top of the page. Is that your handwriting?

A. No sir.

Q. Whose is that, do you know?

A. I believe it is Mr. Godshall's.

Q. I show you another sheet marked "6 12 48." Is that in your handwriting at the top of the page?

A. No sir.

Q. Is your answer the same as to whose that is?

A. Yes sir.

Q. What was the purpose of keeping these yellow sheets, Mrs. Degan, if you know?

A. Well, from those I wrote up the docket.

Q. You wrote up the docket?

A. Yes.

Q. And if you wrote up the docket did you observe that in these yellow sheets on several occasions there was a reference to the fact that those who were presiding consisted of Judges Keller and Boyer?

A. Yes sir.

Q. Did you put that in the docket?

A. Why, I may have. I don't just recall. I may have put it in.

(349) Q. I want to be frank with you. We find that in the minute book that there is some question about the docket. That is the reason I am asking you about the docket. Would you like to see the docket?

A. I could answer it better, yes.

Q. I show you "Relator's—Mrs. Degan. I show you the original docket entries, of which we have a copy marked "Relator's Exhibit No. 4," and will you state whether or not those docket entries reflect all the times that Judge Boyer and Judge Keller presided together during the Darcy trial as reflected by this?

BY JUDGE MURPHY: As we understand it, the witness said the very entries in question were not made by her but by another person in the room —

BY MR. MARGIOTTI: But it was her duty to put them in the record.

BY JUDGE MURPHY: She put something in the record. Of course, you can ask a question whether or not there is concurrence and agreement between one thing and another ——

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: But she was apparently not in the room when the Judges were on the bench, if they were.

BY MR. MARGIOTTI: I am not saying they are—I am only saying—I only want to know—she had transcribed from the notes, what appears on the notes, about his appearance into the record; that's all. Whether or not she was there, I don't care.

BY THE WITNESS: (341) Yes sir.

BY MR. MARGIOTTI:

Q. You did?

A. Yes sir.

Q. Let's take, for instance—we have come to the conclusion there was some discrepancy, but we may be wrong. Let's take the date of June 11, 1948. Does that show who was presiding that date; does the docket entry show who was presiding that date?

A. June 11 ——

Q. Yes.

A. Honorable Hiram H. Keller.

Q. All right. Now then, you say you took these notes and it was your duty to properly reflect in the docket entry what was on these notes. Will you look at the notes as to who was

presiding on 6/11/48 and tell me whether the record, the docket entry, correctly reflects what was on the note?

A. No, it does not ——

BY MR. VAN ARTSDALEN: I object. I think he is cross-examining his own witness.

BY JUDGE MURPHY: If that is your only objection, your objection is overruled.

BY MR. MARGIOTTI:

Q. If it does not reflect the correct note, do you know why it doesn't? I think we would all be interested in knowing that.

BY JUDGE MURPHY: Young lady, we may get a little light if I tell you this: We have here several docket entries and we have the transcript of testimony at the trial and the transcript of testimony shows that throughout the whole trial Judge Boyer (342) appeared once on the bench; the docket entries themselves as to this trial show a certain situation. Now apparently there were some memoranda sheets taken in the courtroom. And what we want to know is did Judge Keller preside at this trial and conduct it or did he and Judge Boyer do it, or was Judge Keller on the bench alone throughout the trial, or did Judge Boyer at times sit with him at times, and if so, when? That is the question.

BY MR. MARGIOTTI:

Q. Will you answer the Judge's question and I will ask you some other questions?

BY JUDGE MURPHY: I didn't ask a question. I was informing her.

BY MR. MARGIOTTI:

Q. That is not the question. That is not the information I was seeking. I am seeking to ascertain why the discrepancy between these docket entries and these notes.

A. I probably made the mistake and failed to put Judge Boyer's name if it is on the sheets there.

Q. I see. Would you make the same answer—I call your attention now to June 12, 1948. What does the docket entry show about who was presiding at the Darcy trial?

A. Judge Keller.

Q. Now I call your attention to the yellow sheets, which are a part of "Relator's Exhibit No. 116," and who do they show was presiding?

A. Judge Keller and Judge Boyer.

Q. Now what is your explanation for that entry not appearing in that manner in the docket?

A. I probably failed to put it in.

(343) Q. I see. All right. Now then, as to 14—6. 14, what does the docket entry show about who was presiding?

A. Judge Keller.

Q. Now I call your attention to the yellow sheets, as part of "Relator's Exhibit No. 116," and who do they show was presiding?

A. Judge Keller and Judge Boyer.

Q. And if you failed—did you fail then to properly report that in your docket entry?

A. Yes, I would say so——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Did you report it as indicated in the yellow sheets, whether properly or otherwise?

A. I tried the best of my ability to report it as on the sheets.

Q. Did you?

A. No. I didn't there.

Q. Why not?

A. Because I knew Judge Keller was trying the case. I can't remember why I didn't put Judge Boyer's name in there.

BY JUDGE WATSON: As I heard the statement by the witness "I knew that Judge Keller was trying the case." Did I hear that correctly?

BY THE WITNESS: That is right.

BY JUDGE WATSON: Well, was Judge Boyer trying the case?

BY THE WITNESS: No sir.

(344) BY JUDGE WATSON: He was not.

BY MR. MARGIOTTI:

Q. Do you know how long Judge Boyer stayed on the bench on these occasions when he presided?

A. No ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI: The only reason I am asking that question is in view of the Court's question.

BY JUDGE MURPHY: You have used the words "Judge Boyer presided."

Young lady, to your knowledge, did Judge Boyer preside at all in the Darcy case?

BY THE WITNESS: No sir.

BY MR. MARGIOTTI:

Q. Mrs. Degan, do you know what part, if any, he took in the Boyer trial?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY MR. MARGIOTTI: (345) Pardon me!

Q. Mrs. Degan, do you know what part, if any, he took in the Darcy trial?

A. Will you repeat the question?

BY THE COURT: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY THE WITNESS:

A. No, I do not.

BY MR. MARGIOTTI:

Q. I don't remember—neither does Mr. Pannell, whether I asked concerning June 9, but I will ask it again anyway. On June 9 whom does the docket entry show as presiding in the Darcy trial—1948?

A. Honorable Hiram H. Keller.

Q. Now I am going to show you the notes, which are part of "Exhibit No. 116," and who do they show?

A. Judge Boyer and Judge Keller.

Q. Who was the Chief Clerk at that time, Mrs. Degan?

A. Of Quarter Sessions ——

Q. Yes.

A. Matthew L. Godshall.

Q. The reason—is your reason any different for the difference between the notes and the docket entries—the reasons you gave for the other occasions is the same reason—I withdraw the question. Will you tell me why in the last reason—in the last reason—the one I asked you about June 9, the notes show that Judge Keller and Judge Boyer presided while the docket entries show Judge Keller?

A. We also have a minute book where those minutes get put in.

(346) Q: Yes ——

A. At the beginning of the trial as I wrote it up the said case being heard before Honorable Hiram H. Keller. Therefore, I did not put Judge Boyer's name in the trial because it was heard before Judge Keller, and in the minute book probably both Judges are named.

Q. Well, do you know what the minute book shows?

A. I haven't looked at it since I wrote it up.

Q. Who kept the minute book?

A. Who docketed the minute book ——

Q. Yes.

A. I did.

Q. I show you Criminal Docket Book "Relator's Exhibit

No. 115," and I ask you now to look at the entries in the minute book under the date of June 9, which is the last date I asked you, and what does that show with reference as to who presided?

A. Judge Keller and Judge Boyer.

Q. That would be the same as the notes?

A. Right.

Q. But so far as the docket entries are concerned, do you know what they show as to who presided that day?

A. On June 9 ——

Q. Yes.

A. Probably just Judge Keller.

Q. I don't like to have you say "probably." I would like to have you definite.

A. I just looked at it and I can't recall.

Q. We will let you look at it.

A. Judge Keller.

Q. "Relator's Exhibit No. 4," who does that show?

A. Judge Keller.

(347) Q. How come that the notes show Judge Keller and Judge Boyer; the minute book shows Judge Keller and Judge Boyer; and the docket entries show only Judge Keller?

A. That is the way we do it. That is the way we write it up. The minute would be—I would have to put on the minutes who came in in the morning and presided there, but they don't say they had it complete, so in that particular case Judge Keller had it, and that is the Judge that is mentioned here.

Q. That is the reason?

A. That is the reason here.

Q. Do you know how long in each instance Judge Boyer would remain on the bench?

A. No, I couldn't tell you exactly.

Q. All right; that answers the question.

BY JUDGE MURPHY: Did they have regular motion days in Quarter Sessions; did they have a certain day in the week when there were motions heard by the Court?

BY THE WITNESS: Before Court began—before the trial began——

BY JUDGE MURPHY: In some courts they have Mondays, Wednesdays and Fridays, or a certain day in the week, which is motion day when lawyers who have anything to do with cases that are going on come before the court in the morning before they get on with the trial. Do they have any such thing down in Bucks County?

BY THE WITNESS: Yes, we do.

BY JUDGE MURPHY: Now how many different days in the week was that business, or was it each day?

(348) BY THE WITNESS: I think each day the Court was opened they could do that.

BY JUDGE MURPHY: Well, each morning in Bucks County while you were there in 1948 did the two Judges come on the bench to dispose of business in the way of motions and the like, or do you know?

BY THE WITNESS: I don't know if they come everyday.

BY MR. MARGIOTTI: That is all.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. It was the practice, however, was it not, at the beginning of each session both in the morning and in the afternoon for both Judges to come on the bench to hear any miscellaneous motions that may be presented to them?

A. Yes sir.

Q. And your minute book where it indicates that Judge Keller and Judge Boyer were both presiding, that indicates that both of them came up on the bench at that time, is that correct?

A. That is right.

Q. Now then, if one of them should leave the bench, would that be recorded on your minute book?

A. No sir.

Q. It would not be. And, Mrs. Degan, the pencil notations that are in your handwriting you were present in Court during those periods of time—correct?

A. Yes sir.

BY MR. VAN ARTSDALEN: That is all.

(349) BY MR. MARGIOTTI: All right, Mrs. Degan. Thank you very much.

(Witness excused.)

MR. MATTHEW L. GODSHALL, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Godshall, where do you live?

A. Doylestown, Bucks County.

Q. Will you state whether or not you held some office in that County?

A. I did; Clerk of the Court, Quarter Sessions, Oyer and Terminer, 1948 to 1951, inclusive.

Q. What part of 1948 did you start?

A. I started January 1, the first Monday in January.

Q. And you continued in that job until when?

A. The first Monday in January 1951.

Q. And during the time that the Foster-Zietz trial was on and the Darcy trial was on were you the Clerk of the Court?

A. I was.

Q. In other words, you had supervision over all the other clerks who were in your office?

A. That is right, sir.

Q. And you were Mrs. Degan's boss?

A. That is right.

Q. And what are you doing now?

A. I have a store.

Q. I see. Now I would like to ask you a few questions about the selection of the jury in this case. Do you remember how the jury was selected?

A. I do, sir.

(350) Q. How was it selected? Let's take first the—let's take the Foster-Zietz trial first.

A. Well, as a rule of the County the panel would be brought in on a certain day and from that panel we selected jurors.

Q. And when the panel reports, what part of the courtroom do they report to?

A. They come in the main courtroom.

Q. The main courtroom?

A. That is what we call the main courtroom; yes sir.

Q. Is that the courtroom in which the defendants were tried?

A. For some trials. It has also other courtrooms.

Q. Well, in this particular case will you tell me which room they reported?

A. The main courtroom.

Q. Is that the room in which the defendants were tried?

A. That is right.

BY JUDGE MURPHY: You are talking about "in this particular case." I assume that is Darcy. The next question: Is that where the defendants were tried?

BY THE WITNESS: That is right; after the jury was completely ——

BY JUDGE MURPHY: I am talking to counsel. I don't know what we are talking about. It appears in one sentence one thing and in the other another.

BY MR. MARGIOTTI:

Q. The Foster-Zietz trial was that conducted in the main courtroom?

A. It was, sir.

Q. And was the Darcy trial conducted in the same room?

(351) A. It was, at a different time; yes sir.

Q. At a different time but in the same room?

A. Same courtroom, yes sir.

Q. You say that the jurors report in that particular room?

A. They do.

Q. So that when the jurors in the Foster-Zietz case reported they reported in that room?

A. Yes sir.

Q. And when the jurors in the Darcy case reported they reported in the same room?

A. They did, sir; yes sir.

Q. Do you know what day the jurors reported in the Darcy case?

A. Well, you have got me—I couldn't just—that has been quite sometime; I have been out. I think it was June ——

Q. Don't guess. If you don't know, don't guess—if you know; otherwise, the record is the best evidence.

A. I couldn't swear to that.

Q. On June 1 the Foster-Zietz trial was going on, wasn't it—it was in progress?

A. It could have been, yes sir. If it was on the record, it could—but I have been out of there sometime.

Q. Only for the purposes of refreshing your mind as to June 1 ——

A. June 1 ——?

Q. Yes. I will have you look at the docket entries marked "Relator's Exhibit No. 1" under June 1. That will probably refresh your memory as to whether or not the Foster-Zietz trials were going on on that day. Just look under the date of June 1.

A. Yes sir.

Q. Now then, do you know when the jurors for the Darcy case (352) appeared or returned in connection with their duties, when they first appeared, when they reported?

A. Yes sir, when they appeared ——

Q. The Darcy case.

A. The Darcy case. I would say the following week ——

Q. Do you know?

A. I can't swear to it, no sir, because it has been sometime.

Q. I don't want you to guess.

A. I can't swear to that, sir.

Q. Let me show you a record. Look at "Relator's Exhibit No. 10" on Page 331, and see whether or not the jurors didn't report on June 1, 1948.

BY MR. VAN ARTSDALEN: I object. The record will speak for itself in that respect.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Will you look at that record and see whether or not it refreshes your memory as to when they returned?

BY JUDGE MURPHY: "Returned" ——

BY MR. MARGIOTTI: When they came in; when they appeared.

BY JUDGE MURPHY: Which?

BY THE WITNESS:

A. For the second week you mean, sir ——

BY MR. MARGIOTTI:

Q. Look at the record and see what it says; then I will ask

you some questions. See whether or not it refreshes your memory as (353) to when the jurors answered their summons.

A. The second week it says here which must be correct. You see, I can't swear to it unless I read it here in refreshing my memory. It is over six years ago. I have been out of Court two, and I can't swear definitely to some of these things.

Q. Will you look at the second page too to ascertain whether or not there is anything on that second page that refreshes your memory? Don't answer the question until I ask you one.

BY JUDGE MURPHY: For the record, what is the second page?

BY MR. MARGIOTTI: I think that is a good question. The second page is Page 332.

BY THE WITNESS:

A. The second week, that would be what date, sir ——

BY MR. MARGIOTTI:

Q. Now you have looked at that. I am going to ask you a question.

BY MR. VAN ARTSDALEN: The question was whether that refreshed his recollection.

BY MR. MARGIOTTI: I didn't ask him that. I didn't ask him anything yet.

Q. I wanted you to look at that in order to determine whether or not your memory has been refreshed. If it has, I am going to ask you some further questions. If it hasn't, I am

going to stop. Has your memory been refreshed by that record —yes or no? Otherwise, the record speaks for itself.

BY JUDGE MURPHY: Sir, what you are being asked is if by looking at that page something occurs to your mental processes where you now remember that that occurred on that day; do you?

BY THE WITNESS: (354) No sir, I do not.

BY JUDGE MURPHY: Next question.

BY MR. MARGIOTTI:

Q. When the jurors appeared in the large courtroom the first day that they showed up in obedience to a summons, will you state whether on that day as a general practice there would be a number of jurors excused who had proper excuses?

A. Yes sir.

Q. Now, Mr. Godshall, I want you to look at "Relator's Exhibit No. 116" and selected therefrom, take the papers out and if there are any papers in your handwriting, will you tell me which ones are in your handwriting?

A. That is in my handwriting, sir.

Q. If that is in your handwriting, so that we have this clear for the record, that is a white paper having attached thereto a yellow sheet; is that right?

A. Yes sir.

Q. All right.

A. The third sheet of this here is in my handwriting, the third sheet, #1 it has marked.

BY MR. MARGIOTTI: May I have him put an "x" on any that is in his handwriting? I will tell you what we will do.

Put a "G" on anything in your handwriting. Start with these sheets and then we won't have any mistake.

BY JUDGE MURPHY: We are now in Federal Court and obliterating to that extent to a State record, but I don't think much harm is done so far by marking "G"; ordinarily it is not done.

(355) BY THE WITNESS: Now there is two different writings on this sheet here; Mrs. Degan's and my own is on the same sheet here. Is that the answer?

BY MR. MARGIOTTI:

Q. That is O.K. Will you tell the Court, please, your purpose in keeping these papers, these papers here?

A. For the record of Quarter Sessions Court.

Q. And what would you do with them?

A. They would be entered in the docket in the Quarter Sessions room.

Q. In other words, these are the original notes?

A. They are notes to a certain extent, minute notes. Notes in court were taken by the stenographer. Those are notes taken by myself.

Q. Those are the first notes taken by you or by your clerk?

A. That is right. There is more. May I go on?

Q. If there is more, go on and mark them all.

A. I think I have them all, sir.

Q. When were those notes made with reference to the occurrence of the events thereon noted?

A. They start with the opening of the court on the date of the trial.

Q. What I would like to know, to make it short, is whether or not you made those notes as the events occurred as shown on the notes?

A. That is right. They are the minutes of the court.

Q. I note there a number of instances—if the Court will permit me to ask one general question—a number of instances that show that Judge Keller and Judge Boyer presided at the Darcy trial; did you notice that?

(356) A. Not at that Darcy trial.

Q. Did you notice that in your notes?

A. Can I explain that?

BY JUDGE MURPHY: Yes.

BY THE WITNESS: The rules of the court—all the judges came into the courtroom ——

BY MR. MARGIOTTI: I object.

BY JUDGE MURPHY: The objection is overruled.

BY THE WITNESS: Our court the judges came on the bench the same as two here; then there would be legal matters came before the court, lawyers on motions, and at the time of the trial, what time the legal matters stop, the judge of that court would take his case and the other judge would go to the other courtroom, he would leave the court. The judge at that time didn't happen to go into the matters, the trial he was attending or taking care of.

BY MR. MARGIOTTI:

Q. Are there any minutes showing what time—strike that. The minutes do show that Judge Boyer and Judge Keller presided at certain times as outlined in those notes?

A. At the opening of the court in the morning.

Q. That is right. Do the minutes show when Judge Boyer left the bench?

A. No sir.

Q. Do your minutes show whether or not he returned to the bench thereafter?

(357) A. Judge Boyer ——

Q. Yes.

A. Judge Boyer did not return to the bench.

Q. If he did return, would your minutes show it?

A. You mean if he returned to the bench in what capacity ——

Q. Let's assume he sat on the bench in any capacity during the Darcy trial, would your minutes show that?

A. I would have put it back on if he came into the trial, but I don't remember Judge Boyer ever coming back into the trial. He had other cases in the other courtroom, sir.

Q. Well, do you know that there was an incident reported in the transcript of testimony when there was an objection to his sitting on the bench in the Darcy trial?

A. No sir, I do not remember him coming back, sir.

Q. Did you make a notation of when Judge Boyer came back on that occasion?

A. I don't know what you are talking about. I don't remember Judge Boyer coming back.

Q. Coming back where?

A. Onto the bench as you are referring to.

Q. Did you see him coming on the bench?

A. No sir; only at the time we opened court in the morning.

Q. If he came back on the bench and you know he came back on the bench, why didn't you note that he came back on the bench?

A. I didn't know that he came back on the bench ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

(358) Q. What was that?

A. I did not see him come back to the bench.

Q. Will you look at your notes for June 12, 1948 at 10:00 o'clock in the morning?

A. June 12—yes sir.

Q. Who were the judges presided in the morning?

A. Every other morning both judges come ——

Q. I am asking you who presided that morning, June 12?

A. Judge Keller presided.

Q. Who else?

A. Calvin S. Boyer.

Q. Why didn't you mention Boyer ——

BY JUDGE MURPHY: I might say there is no jury here and "presided" has two meanings ——

BY MR. MARGIOTTI: Who presided on the bench whether he presided or sat there?

BY JUDGE MURPHY: The question is who presided at the opening of court in the morning? and the other question is who presided at the trial?

BY MR. MARGIOTTI:

Q. I will withdraw the trial. I want to know who sat on the bench.

A. Honorable Judge Keller.

Q. Who else?

A. In the morning Judge Boyer. They had some other legal matters which they would take up in the morning.

Q. Do you know whether or not on that morning Judge Boyer left the bench?

A. Judge Boyer left the bench every morning, sir.

BY MR. MARGIOTTI: We ask that the answer be stricken out, not responsive.

BY JUDGE MURPHY: (359) Read the question and answer, Mr. Reporter.

(Question and answer read by the Reporter.)

BY JUDGE MURPHY: The motion is denied; the whole includes its parts.

BY MR. MARGIOTTI:

Q. Will you tell me whether or not he left the bench at any particular time that morning?

A. I couldn't specify the time. That would be in the Stenographer's record, I should think. When the trial started then Judge Boyer would go to his courtroom with other cases, as I said before.

Q. You said that was in the record of the Stenographer?

A. I don't have anything to do with that.

Q. Didn't you say that? I thought you said that. All right, then you didn't see him leave the bench at all—you recall?

A. Yes sir, every morning he would leave the bench.

Q. Did you see him return?

A. No sir.

Q. Did you see him participate in the Darcy trial?

A. No sir.

Q. Can you tell me at what portion of the trial it occurred on that day Mr. Achey said to Judge Boyer:

"I object to Judge Boyer sitting in on this case. I don't mind trying against one Judge."

and Judge Boyer said:

"The Judges reserve the right to confer without being obliged to get the consent of defense counsel," and Mr. Achey said:

"In view of the statement which Judge Boyer made to the jury in the trial of Foster and Zietz, which was tried last week, I submit that he has disqualified himself from sitting in on this case, and it is prejudicial to this defendant."

(360) Do you know when that happened?

BY JUDGE MURPHY: As we understand, the record of the trial shows that occurred at sidebar. I think in fairness to the witness he ought to be asked if he was in position to hear what occurred at sidebar.

BY MR. MARGIOTTI:

Q. Did you observe a sidebar conference between Judge Boyer and Mr. Achey and possibly engaged in by Judge Keller?

A. No sir; I could—it could have been that I was out for a few personal reasons during a few minutes.

Q. You didn't know there was any sidebar conference at any time during the trial?

A. No sir.

Q. You didn't know there was any conversation such as I read to you; you weren't within hearing distance of it even though it was quiet conversation at sidebar?

A. I couldn't hear any conversation at sidebar.

BY JUDGE MURPHY: Are you hard of hearing?

BY THE WITNESS: Slightly, yes sir. It is just getting worse in the last years.

BY MR. MARGIOTTI:

Q. Was it the duty of anyone to record it anywhere the return of Judge Boyer to that courtroom once he left it?

A. I don't think—that I don't think is in my ability to answer. I don't have anything to do with that part of court: Judge Boyer and Judge Keller.

Q. I am asking you if you know it was the duty of anyone to report (361) his return to the courtroom once he left it?

A. In what way? Just the courtroom or into the trial, sir ——

Q. Let's say sat on the bench.

A. I think if he sat on the bench I would note that.

Q. You would note that?

A. Yes sir.

Q. Was it your duty to note it?

A. I would put it in my minutes.

Q. You would put it in your minutes?

A. If he sat on the bench.

Q. If he sat where lawyers sat or newspapermen sat, would you report it?

A. Well, I never saw Judge Boyer or Judge Keller sit in the newspaper reporters stand ——

BY MR. MARGIOTTI: I move to strike that.

BY JUDGE MURPHY: The motion is denied. We think it is partially responsive. The question is would he report it? We think it is partially responsive.

BY MR. MARGIOTTI:

Q. If he sat anywhere in the body of the courtroom except on the bench, would you report it?

A. No sir, I wouldn't report it if he walked into the courtroom, into the judges' chambers or things like that; no sir.

Q. Would you report when he left the bench each morning?

A. No sir. I just—as I said before, if that came along then the (362) Court Stenographer would take over. That was his duty. I am no stenographer. I was just Clerk of Courts. I never trained for stenographer, sir.

Q. You relied on the Stenographer reporting when he left the bench?

A. I think he would take care of that; that is his duty.

BY MR. MARGIOTTI: You may cross-examine.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Godshall, I think you inadvertently said you served from 1948 to the first Monday in January 1951. It should be 1952?

A. 1952 it should be; four years inclusive.

Q. Now these pencil notes you have, they are the minutes which you as Clerk of Quarter Sessions take; they were your Quarter Sessions work only; is that correct?

A. That is right.

Q. Isn't it also correct in the morning and at noon there are other matters taken up before the bar of the Court both as Common Pleas and Orphans Court?

A. Yes sir.

Q. And is it not also correct that those pencil notes are merely for your own records in the minute book?

A. That is right.

Q. And the minute book is subsequently made up?

A. That is right.

Q. Now then, the docket of criminal cases themselves, either Oyer and Terminer or Criminal Sessions, were also made up

partly from the notes of the Court Stenographer and partly from your pencil notes; is that correct?

A. Yes sir.

(363) Q. And in the docket of the Court of Oyer and Terminer where a case indicates that Judge Keller is presiding at that case, would that not indicate that he is the judge that is trying the case?

A. He is trying the case, yes sir.

Q. If both judges were sitting jointly trying a case, would it appear in the docket as to that criminal case as both judges sitting jointly trying a case?

A. Just as it occurs if they had both laywers, we put both down.

Q. As a matter of fact, when one of the judges would leave the bench in the morning your minutes would not note they leave; is that correct?

A. They wouldn't, no.

Q. As a matter of fact, if Judge Boyer and Judge Keller after leaving should come back in, would or would not your notes indicate their return?

A. Not just coming into court unless they were sitting in on the trial.

Q. When you say "they were sitting in on the trial," you are referring to a situation where if they came in and jointly sat as a trial judge in that case; is that correct?

A. That is right.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Godshall, were there any motions presented during the Darcy trial by any of the lawyers at all?

A. Any motions for——

(363a) A. Motion or exceptions, sir——

A. Motion or exceptions, sir——

Q. No, no. I mean just motions such as the Court asked you about, and the District Attorney, where lawyers come in and make motions concerning pending cases.

A. No sir. That was taken up before the trial.

Q. That was taken up before the trial. Now do you know of any motion being taken up before the trial?

A. That is the rule of the court every morning.

Q. I mean in the Darcy trial.

A. Well, there could have been before the court before they tried the cases.

Q. I want to know if you know of any.

A. I couldn't honestly say there were, but they must have been.

Q. Do you know of any? Particularly do you know of any?

A. No sir, I couldn't answer that question.

Q. And if there had been some presented, would there not be a record of them in the Clerk's office?

A. There could have been in Civil Court or in Quarter Sessions Court, yes sir. If that is what it happened to be, that would be dated that day. There would be dates on the day they were presented, the motions.

Q. In other words, you would make an entry if a motion was presented and the date that the court acted on the motion?

A. If he acted that morning I wouldn't put it that way, case called up.

Q. You would certainly make an entry a motion was presented on a certain date?

A. Not unless in our court, Quarter Sessions Court.

Q. In your Criminal Court you would?

A. That is right.

(364) Q. Do you have a Prothonotary in your County?

A. Yes sir.

Q. So you have no personal knowledge of any civil or criminal cases be presented any particular morning before court convened, as you have said yourself, during the Darcy trial?

BY MR. VAN ARTSDALEN: I object to the word "convened."

BY JUDGE MURPHY: You object to the question?

BY MR. VAN ARTSDALEN: Yes sir.

BY JUDGE MURPHY: It is sustained as repetition. He said he didn't. We will permit it once more.

BY MR. MARGIOTTI: I am satisfied —

BY JUDGE MURPHY: The witness said the motions — no, he couldn't recall whether there were any motions made. If there were, they might be Common Pleas—civil or criminal. If they were civil, the Common Pleas clerk would make the record. If they were criminal, there would be a record. He has no recollection as of now whether there were any or not.

BY MR. MARGIOTTI: That is all.

RE-CROSS EXAMINATION

BY MR. VAN ARTSDALEN:

Q. Isn't it also true both judges would come in in the morning and at noon whether or not they knew in advance there was going (365) to be any motions?

A. That is right.

Q. And lawyers were afforded opportunity to present their motions?

A. At that time.

BY MR. MARGIOTTI: We object; it has been gone over.

BY JUDGE MURPHY: That part wasn't what he brought on, the court by going on the bench would not indicate there necessarily was but they went on anyhow to afford the opportunity. That wasn't here before.

BY JUDGE WATSON: It was a practice obviously that would avoid the necessity of judges being disturbed in chambers. They may have and said "Here we are; present your motion." Was that it?

BY MR. VAN ARTSDALEN: That is right.

BY JUDGE WATSON: I can understand it. It is very common practice in many districts in State courts.

BY MR. MARGIOTTI: If that was the only practice, I would have no complaint.

BY JUDGE MURPHY: That is where we are so far. Let's go on.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. And these motions were all presented before the court would convene—

BY JUDGE MURPHY: (366) That is a technical word "convene."

BY THE WITNESS: I said before that the court—they present in the morning——

BY JUDGE MURPHY: You are now asked a question whether the court would convene. If the court is on for motions, it has convened. If the court is on for trial, it is another matter.

BY MR. MARGIOTTI: He said—I understood him to mean that before convening of the court that the judges would be on the motions.

BY JUDGE MURPHY: This Court is not confused. Let me put it that way. We will take a ten-minute recess.

(Recess.)

(Court resumes after the recess with all parties, including the Relator, David Darey, present in Court.)

BY JUDGE MURPHY: Gentlemen, in order that the Court may arrange its calendar, we had some eight or nine pretrials today, they are continued until a week today, and we have others scheduled throughout the week; and certainly we don't want to in any way to impede the progress of this particular hearing. But so we can make some at least tentative arrangements, will counsel for the Relator give the Court an idea of how much longer he thinks his side of the case will take?

BY MR. MARGIOTTI: If the Court please, it is my esti-

mation we will conclude our testimony by—certainly by tomorrow evening and apparently long before that, maybe by noon tomorrow. We will try to finish (367) today if we can.

BY MR. VAN ARTSDALEN: We anticipate calling probably about ten witnesses. On direct-examination I don't think any of them will take more than one-half hour at the very most.

MR. A. RUSSELL THOMAS, recalled.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. I want to ask you about an editorial appearing in your paper called "Raus Mit 'Em." What is the English of that?

A. I haven't the slightest idea.

BY JUDGE MURPHY: It means "Throw them out."

BY MR. MARGIOTTI: Court will take judicial notice of that, I assume.

Q. Mr. Thomas, you testified about the paper being sold at some inn; your paper being sold at some inn; do you remember—some agency?

A. Agency, yes.

Q. What was that—what agency?

A. Kenny's News Agency.

Q. All right. And where was your paper published?

A. Where was the paper published? In the Intelligencer Building, Monumental Square.

Q. How far from the courthouse?

A. One-half block.

Q. Will you state whether or not people came to your publishing room for papers?

A. They have customers come in to buy papers, and visitors.

Q. How soon after the publication of your paper would you say that (368) it would be in the hands of all your subscribers—did you provide it to all your subscribers?

A. If everything goes right, by the next morning the out of town subscribers, and people living in the community probably the same afternoon.

Q. You stated while you were on the stand that you were the correspondent for the Bristol paper?

A. That is right.

Q. Will you state whether or not you gave the Bristol paper the same stories that appeared in your paper?

A. Substantially so. I made copies of most of the stories.

Q. I see. Will you state—we are offering this as secondary evidence on account of not being able to get the original papers—whether or not you had called to your attention for checking purposes or called to your attention the Bristol papers as they were published?

A. I didn't get it ——

Q. Were the Bristol papers called to your attention?

A. Yes.

Q. And will you state whether you observed whether their stories were substantially the same as those appearing in the Intelligencer?

A. I am quite positive, yes.

Q. Owned by the same people?

A. That is right.

Q. Who was the editor at that time of the Bristol Daily Courier?

A. Mr. Serrell Detlefson.

BY MR. MARGIOTTI: That is all.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

(369) Q. Kenny's News Agency is not an inn?
A. No sir.
Q. It isn't located in an inn?
A. No sir.
Q. It is in a separate building, is that correct?
A. Yes sir.
Q. Of all the articles that appeared in the Bristol paper, did you read them?
A. I did not read all of them. I just glanced over some articles at night.
Q. The headlines were different, were they not?
A. Naturally.
Q. Isn't it correct the headlines in the Bristol paper were much smaller and gave much less prominence than appeared in the Doylestown paper?
A. I think the makeup at that time was more conservative.
Q. And was a conservative paper, isn't that correct?
A. That is correct.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. But the stories were the same?
A. That is right.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

MR. MATTHEW L. GODSHALL, recalled.

RE-DIRECT EXAMINATION (Continued):

BY MR. MARGIOTTI:

(370) Q. Mr. Godshall, do you remember where the jury stayed during the Darcy trial?

A. I can't honestly say whether it was the Doylestown Inn or the Bucks County Inn. It was one or the other. I can't say which it was. It runs in my mind it was the Bucks County Inn but I couldn't say for sure.

BY MR. MARGIOTTI: All right; that is all.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN: No questions.

(Witness excused.)

MR. SERRELL DETLEFSON, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Detlefson, where do you reside?

A. Bristol, Pennsylvania.

Q. Where were you living in 1948?

A. The same place.

Q. And what were you doing at that time?

A. I was editing the Bristol Courier.

Q. What was the circulation of your paper in 1948?

A. 1948—approximately 7,000, sir.

Q. And will you state whether that circulation was in Bucks County?

A. Very much so; not completely but ——

Q. Practically all of it?

A. That is right.

Q. What section of Bucks County did you cover?

A. Lower Bucks County.

(371) Q. Where did you get—did you carry stories on the Feasterville robbery and killing?

A. Yes, we did.

Q. And did you carry stories on the—between the act and the trials of Foster and Zietz?

A. Well, I presume we did. The story was very current then.

Q. Did you carry stories on the Foster-Zietz trial?

A. Yes sir.

Q. And also on the Darey trial?

A. That is right.

Q. Where did you get most of your stories?

A. From A. Russell Thomas.

Q. The gentleman who just appeared on the stand?

A. Yes sir.

Q. And did your stories run about the same as he turned over to you?

A. Yes.

Q. I believe someone said your headlines were a little more conservative?

A. Our makeup was more conservative.

Q. Now, when you said the southern part of the county would you mind for the record telling us what sections of Bucks County that would include?

BY JUDGE MURPHY: We have a map. All the Court has to do is look at it. We have north, east, south and west.

BY MR. MARGIOTTI: I am not too sure the map will tell you particular sections.

BY JUDGE MURPHY: (372) Go ahead.

BY MR. MARGIOTTI:

Q. What do you mean by the southern part of the county?

A. I mean Morrisville, Langhorne, Penndel, the townships of Bristol, Bensalem.

BY MR. MARGIOTTI: That is all.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Most of the circulation, however, was in the Borough of Bristol; is that correct?

A. In the Borough and the immediate surroundings.

Q. And that was a daily paper, was it not?

A. It was.

BY MR. VAN ARTSDALEN: That is all.

BY MR. MARGIOTTI: That is all.

BY THE COURT: Mr. Kerrigan said reading from the record that your circulation in 1948 was 5,397; you say it was 7,000; which is right?

BY THE WITNESS: I said approximately. I am not just too positive about that.

BY JUDGE MURPHY: You are about 1,700 off between you.

We understood you had stipulated before that 5,397 was the circulation. Now which is which?

RE-DIRECT EXAMINATION.

(373) BY MR. MARGIOTTI:

Q. Which is correct?

A. Well I honestly don't know. I haven't the figures. I can't tell you. Probably Mr. Kerrigan had checked the figures before he left.

BY JUDGE MURPHY: I already understand you stipulate 5,397 and there was a paper on that table—it was read from at the time—on the Commonwealth's table.

BY MR. MARGIOTTI: I think we will stick to the stipulation.

BY JUDGE MURPHY: Go ahead.

BY MR. MARGIOTTI: That is all.

BY MR. VAN ARTSDALEN: That is all.

(Witness excused.)

MR. GEORGE FOX, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Fox, where do you live?

A. Quakertown.

Q. How long have you lived there?

A. About twenty-five years.

Q. That is in Bucks County?

A. Yes.

Q. What section of Bucks County?

A. The northern part.

Q. The northern part. Will you state what is your business?

(374) A. Reporter.

Q. For what paper?

A. Quakertown Free Press.

Q. Is that a weekly or daily paper?

A. Weekly.

Q. What day of the week is it published?

A. Thursdays.

Q. Did you publish stories concerning the Feasterville killing and robbery as well as the trials of Foster-Zietz and Darey?

A. Yes, it did.

Q. And you have your papers with you?

A. Yes.

Q. Will you produce them, please?

A. Yes.

Q. Will you state whether or not you know what the circulation of your paper was in 1948?

A. Not quite 5,000.

Q. And will you state where was the principal part of your circulation?

A. Quakertown and mostly R.D.'s around there.

Q. Within a radius of how many miles of Quakertown?

A. Oh, I would say twenty-five.

Q. I want you to turn—strike that. I want you to look at a record that is before you and tell me whether that is a record of the publications of your papers.

A. You mean circulation ——

Q. Whether or not that is a record showing the copies of all your publications?

A. Yes sir.

BY MR. MARGIOTTI: If the Court please, we offer in evidence as of May 20, (375) Pages 1 and 8; May 27, 1948, Pages 1 and 4; May 27, Page 1; June 10, 1948, Pages 1 and 2; June 17, 1948, Pages 1 and 7. But since this is an original bound volume of the original publications, we ask leave to have them photostated for convenience and to furnish the Court and the District Attorney or the Attorney General's office with copies.

BY MR. VAN ARTSDALEN: We object to the offer on the basis of the objection made to prior publications.

BY MR. MARGIOTTI: For the sake of convenience we will mark it just "Relator's Exhibit No. 123."

BY JUDGE MURPHY: The issue of May 20 will be "123(A)"; the issue of May 27 will be "123(B)"; the issue of May 27 will be "123(C)"; the issue of June 10 will be "123(D) and (E)"; and the issue of June 17 will be "123(F) and (G)."

BY MR. MARGIOTTI: What about the 27th? You see, you have two pages.

BY JUDGE MURPHY: Give them all a number.

(Exhibit marked "Relator's Exhibit No. 123 and 123(A) to 123(G), inclusive.)

BY MR. MARGIOTTI: That is all.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Fox, those particular dates that you have referred to, are they the only times in which your paper carried any stories with reference to Zietz, Foster or Darcy?

A. So far as my knowledge, I was not even working with the paper at that time.

(376) Q. You have examined them to see if there were any other articles on Foster, Zietz or Darcy or the hold-up involved in the case?

A. Yes.

Q. And just to clarify one point, in 1948 the Quakertown Free Press was still a weekly paper; is that right?

A. Yes.

BY MR. VAN ARTSDALEN: That is all.

(Witness excused.)

BY MR. MARGIOTTI: At this time I would like to introduce in evidence what appears from the Pennsylvania Manual of 1947-48 giving the population of Bucks County.

BY MR. VAN ARTSDALEN: That will be objected to unless it is shown that is an accurate statement of the figures.

We would accept the 1940 or 1950 census figures but not those figures of 1947.

BY JUDGE MURPHY: We will take it for what it is worth. The official census figures are in 1940 and 1950 and then the Census Bureau has a time estimate figure and then this is the manual and the estimate is as to what the population of Bucks County was, and in recent years it has been growing and growing. Court already knows that. Go ahead.

BY MR. MARGIOTTI: This shows the population of Bucks County to be 107,715.

BY JUDGE MURPHY: Is Doylestown the city along the Delaware River in Bucks County?

BY MR. VAN ARTSDALEN: That is correct.

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(377) MISS A. PATTERSON, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

(Pennsylvania Manual marked "Relator's Exhibit No. 124".)

BY MR. MARGIOTTI: May I state on the record you will find that on Page 860.

Q. Miss Patterson, where do you live?

A. Margate, New Jersey.

Q. Were you in Bucks County subsequent to December 22, 1947 after the Feasterville killing?

A. Yes, I was to the trial; I wasn't in Bucks County until the trial.

Q. You were in Bucks County during which trial?

A. The Zietz and—Zietz and Foster trial.

Q. Did you attend that trial?

A. Yes, I did.

Q. How many sessions did you attend?

A. I was there every day and every evening.

Q. Had you been in Bucks County before the trial?

A. No sir.

Q. Do you know how soon after the Foster-Zietz trial the Darcy trial was held?

A. A week.

Q. Were you present at the Darcy trial?

A. No.

Q. You were not?

A. No.

Q. Now while—during the Foster-Zietz trial where did you stay, in what city?

A. The first night I stayed at the Bucks County Inn and they told (378) me I could only stay one night; there was a murder trial and the jurors were staying at that particular hotel and that I can only stay for one night.

Q. Do you know where the jury was staying that was trying Foster-Zietz?

A. They were staying at the Bucks County Inn—Doylestown Inn—isn't it? Doylestown Inn—pardon me!

Q. Miss Patterson, about how many days were you in Doylestown altogether during the Foster-Zietz trial?

A. Pardon me!

Q. About how many days were you in Doylestown altogether during the Foster-Zietz trial?

A. I was there every day in the courtroom except the last day.

Q. Did you have an interest in that trial?

A. Yes, I did.

Q. What was your interest?

A. I was interested for the justice of the three boys.

Q. Were any of them—were you interested in anyone in particular?

A. I was interested in all of them. One of the boys was my nephew.

Q. Which one?

A. Harry Zietz.

Q. Did you come in contact with people who talked about the case—about the boys?

A. I heard a lot of talk.

Q. Just answer my question.

A. Yes.

Q. Did you come in contact—talked with people?

A. Yes.

Q. And will you tell the Court just what you heard people say, not the exact words but the substance as near as you can possibly (379) do it, and the places and the persons to which the conversations referred?

A. Well, the first night I stayed at the Doylestown Inn and I went upstairs to my room and there was no soap or towel in the room; there were three maids standing across in the hall, I went out and asked them if I could please have some soap and towel, and they said "We are so busy; we are so excited; there is three murderers in jail here in Doylestown, and it is just like a carnival." I never answered them. I said "Please let me have the soap and towel."

Q. What else did you hear said about it?

A. And they said "They haven't got a chance in Doylestown because they hate Philadelphia boys and they are very, very bitter."

Q. Who was very bitter?

A. The people. Everyone was bitter and they also——

BY MR. VAN ARTSDALEN: I object to that answer. I think the question was as to conversations. I think the witness is responding as to her impressions and not as to the conversations.

BY JUDGE MURPHY: She said so far there were three maids at the Inn; they said "There is three murderers here; everything was like a carnival—just like a carnival; they haven't got a chance in Doylestown, they hate Philadelphians."

BY THE WITNESS: That is right. That is what they said. They said another thing—"and they're going to burn for it."

BY JUDGE MURPHY: The three maids said that?

(380) BY THE WITNESS: Yes.

The next day I went across to Fountain Inn, I got a room there ——

BY JUDGE MURPHY: What is the name?

BY THE WITNESS: Fountain Inn.

BY JUDGE MURPHY: All right.

BY THE WITNESS: And there was a man there that lived at the Doylestown Inn. His name—he is deceased since then—he died two or three years ago—and the first day I was coming from the train he was sitting on the porch and I came up and he got up and he said, "Pardon me! Are you one of the boys' mothers?" I said "No, I am not."

He said "Well, this is really a terrible thing." He said "You know, I hate to tell you ——" He said, "Why are you interested in this case?" I said "I am interested in all the boys and I am particularly interested to see that they get justice"—I said. He said "Which one belongs to you?" If I go along against the rumors, I will belong to your family." I said "Yes." He said "Well—well," he said, "you know, they are very bitter in Doylestown especially at boys coming here from Philadelphia." He said, "I hate to tell you. I would do everything in the world I could to help." He said "They haven't got a chance before they start; they haven't got a chance."

BY JUDGE MURPHY: That is two conversations. Anything else you heard.

(381) BY THE WITNESS: Well, there was comments—outside the court, the men around there. They were all—they were going to get together in a group to go to see the execution. One man said "How does it suit you?" They didn't see me where I was standing in another part of the outside. He said "Well, it suits us fine." He said "We are all going and we are going in a group to see them burn, the three thugs."

BY JUDGE MURPHY: All right; did you hear anything else now?

BY THE WITNESS: I was going another day in court—I don't know whether this enters into it or not—this was the third day of the court. District Attorney Biester had addressed the jury; he was talking to them. And after it was over he come down where we were, Mrs. Zietz and Mr. Zietz and the lawyer Rubin and myself. He said "I

would like to be introduced to these people. Is this Harry Zietz's mother and father?" Mr. Rubin said "Yes." He said "This is Mr. Biester." Mr. Biester was crying—I never —I never saw a man cry harder in my life. And he shook each one of our hands. He said "I am very, very sorry I have to say the words I said. I am very sorry but ——," he said, "I want to put your hearts at ease. When it goes to the Pardon Board I will not object in any way." I said "Mr. Biester, you don't realize what that means to us." I said "We are positively heartbroken." He said "You take my word for it," he said, "I will see that they get their justice at the Pardon Board.

BY MR. MARGIOTTI:

Q. Did you hear any other conversations in the courtroom?

A. There was another day they had the high school children there. They wanted—the high school children were brought in and I was (382) sitting in front of the group that come in, they sat in back of me, they were young girls. The two boy prisoners were sitting over with deputies. And Judge Boyer said "Children," he said, "I want you to know that there is a murder trial going on in Doylestown and I want you to know these are the two prisoners that are convicted—going to be convicted of murder." And the kids ——

Q. He didn't say that ——

A. He did so. And the children in the back, they weren't interested any more in what the judge was saying than that chair was. It was the worst thing I could go through. One of the children turned around and said "My father said they are going to burn." I turned around. No one said anything to him. I said "Please keep quiet." I said "Do you know you are in a court."

Then the second day of the trial my sister—we went out for lunch—my sister said "I have a terrible headache; I don't know how I am going to go back to the court." I said "Well—well, we will have a cup of tea and we will go back. Don't put your hat down on your head; put it on top; you keep the hat on in the court." And the jury hadn't come in yet, neither had the judge, the District Attorney Biester was there and the lawyer and myself and Mrs. Zietz and Mr. Zietz. She was sitting beside me. And in a few minutes—she never uttered a word—she slid from the chair and fell on the floor and then her feet were on the chair in front, the seat in front, and she laid there. There was either a nurse or matron sitting in front with us with a white uniform, some kind of uniform, I couldn't tell you what kind, I was too excited. She got up and walked out of the courtroom and my sister laid there and a woman on the right took off (383) her coat and she said "Here, put that under that lady's head." And I took the coat—it was a checked coat—and I put it under my sister's head. Someone said, "We can't do anything about it—we can't do anything about it." I said, "Well, will you please ——

BY JUDGE MURPHY: Do you want more of this?

BY MR. MARGIOTTI: No.
That is all.

CROSS-EXAMINATION:

BY MR. VAN ARTSDALEN:

Q. Is it Mrs. or Miss?
A. It is Miss Patterson.
Q. The only reason you came to Doylestown was because of the trial?

A. Yes, that is correct.

Q. Now you didn't attend all of the Darcy trial, did you?

A. No, I didn't.

Q. What day did you come to Doylestown?

A. I came the day before the trial. I came the day before.

Q. Do you recall what day that was?

A. I just don't recall exactly. I believe it was a Sunday, but I am not exactly sure of the date.

Q. Do you remember which inn it was you stayed the first night; you said the Doylestown Inn and the Bucks County Inn?

A. It was the Doylestown Inn. I know exactly where it was. The Doylestown Inn.

Q. You don't know who the three maids were?

A. No; I don't. I didn't even look at anybody. I was too heartbroken to hear a remark like that.

(384) Q. Were the three maids in uniform?

A. I don't know that. They were standing in a group. I went into the room. I was tired. I wanted to get undressed and I wanted to get redressed to go to get my dinner.

Q. You mean you are not sure that they had on any special uniform?

A. I can't tell you that.

Q. How do you know they were maids?

A. I know they were maids. They came in and brought me the soap. They said they were so busy they couldn't do the things they should be doing; they were so busy; everything was in an uproar.

Q. Did she talk to you in your room?

A. No; she said that to me in the corridor.

Q. There were two other girls standing there?

A. There were two other girls standing there.

Q. All right. Did you notice anything out of the way

in and about Doylestown when you first came in on that day?

A. I noticed everybody standing on the corner and everybody was talking.

Q. How many people did you see standing on the corner?

A. There were groups of people on every corner. As a matter of fact, in the mornings I got up at 6:00 o'clock ——

Q. I am talking about when you first came into Doylestown.

A. There were groups of people ——

Q. When did you first come into Doylestown?

A. I first came into Doylestown on a Sunday, the day before the trial.

Q. What time was that?

A. What time was that ——

Q. Yes.

A. It was about 5:00 o'clock.

(385) Q. A warm evening?

A. It wasn't too warm.

Q. Clear weather?

A. Yes.

Q. And there was a number of people on the streets of town, is that correct?

A. Yes I saw the jury coming down the street ——

Q. Not the first night ——

A. All right. Pardon me!

Q. Did you observe any disturbances at all in Doylestown?

A. Only talking, constant talking.

Q. Only talking, constant talking. You saw no demonstrations of any sort, did you?

A. What do you mean my "demonstrations of any sort?"

Q. You didn't see a group of people getting together—did you—and making any threats toward any of the defendants?

A. They all said that "the boys should get burned."

Q. They all said that "the boys should get burned." What did you think they meant by that?

A. The electric chair.

Q. That is the verdict that the jury brought in, wasn't it; is that correct?

A. Pardon me!

Q. I will withdraw the question. Now you mentioned a man that lived at the Fountain Inn. That means to us the Fountain House ——

A. The Fountain House. I don't remember much about the Fountain House.

Q. It is right across from the Doylestown Inn?

A. That is right.

Q. About two or three blocks from the courthouse?

(386) A. Yes sir.

Q. You mentioned you talked to a man since died?

A. Yes.

Q. Do you recall his name?

A. Mr. Goodling.

Q. And what was it he told you—that "it was a terrible thing"?

A. He said he personally "was very much opposed to capital punishment"?

Q. He said he "was very much opposed to capital punishment?"

A. Yes.

Q. What else did he say?

A. He said "If there was anything I can do—but the case is cut and dried before it starts." He was at one time Dean of the Farm School at Doylestown.

Q. Now then, in the trial itself did you observe any disturbances in the courtroom?

A. No. I only noticed people were laughing; they got a

kick out of it. You would have thought it was some sort of a movie house.

Q. People laughed here in this hearing at various occasions.

A. Not like they did there.

Q. Was the courtroom at any time cleared by order of the Court?

A. No, it wasn't cleared. The day before—the day they were going to pronounce the final sentence Judge Boyer called our lawyer and he said "Who was that woman sitting there? We don't want any emotional people in this courtroom." And Mr. Rubin said, "Well, that is the boy's aunt."

Q. We are not interested in what Mr. Rubin may have said. (387) Now you heard Judge Biester give his closing address to the jury, did you not?

A. No, I did not. I was in the hospital with my sister.

Q. You were not there at that time, is that correct? What part of the trial did you miss?

A. Only that part.

Q. Only his closing address, so you don't know what he said to the jury?

A. I know what he said before that. He asked for the death penalty.

Q. I said what he said to the jury. Now when was it he came over and talked to you—you said there were tears in his eyes?

A. Who came over and talked to me——

Q. Mr. Biester.

A. The third day of the trial.

Q. I thought you said that was after he addressed the jury?

A. Well, he was talking to the jury every day.

Q. Now that was before then the verdict came in, is that correct?

A. Yes sir.

Q. And before all the evidence had gone in?

A. Yes.

Q. And he told you at that time then that he would not make any objection ——

A. That is exactly what he said—if I never get off this seat alive.

Q. That was before the trial was concluded that he said that he would not object in any way when the matter came before the Pardon Board?

A. That is exactly right—when the matter came before the Pardon Board.

(383) Q. Did anybody say anything to him at that time?

A. We thanked him.

Q. Did anybody say anything to him at that time, Miss Patterson, or anybody in the group heard him say that, indicate why didn't he wait until the trial was over?

A. No, the people were coming over where we sat each day. So we didn't hear any remarks we waited until most of the people were in.

Q. That was the third day of the trial?

A. That was the third day of the trial.

Q. The third day after selecting the jury?

A. The jury was selected. The case was in progress.

Q. Now when was it that Judge Boyer talked to these school children?

A. When Judge Boyer what ——

Q. Talked to these school children.

A. I don't know exactly what day it was. It could be the third or fourth day.

Q. Was the jury in there at that time?

A. Yes.

Q. They were there at the time?

A. Yes.

Q. You mean by that he made those statements to the jury ——

A. That is what he said.

Q. You mean by that he made those statements to the school children while the jury was present?

A. He said "Those are the prisoners ——

Q. What was it he said?

A. He said "We are trying these boys on a murder charge ——

Q. Yes. What else did he say?

(389) A. "— Children, I want you to look at the prisoners."

Q. Yes. What else did he say?

A. I couldn't hear much what they were saying. Those children in the back were talking such.

Q. I thought you said on direct examination he said, "There are two murderers who are going to be convicted?"

A. That is right.

Q. Judge Boyer said that?

A. Yes sir.

Q. While the jury was in the room?

A. While the jury was there.

Q. You are positive of that?

A. I am positive.

Q. Did any of the attorneys raise any objection?

A. They wouldn't allow the attorneys to speak.

Q. Answer my question. Did any of the attorneys raise any objection when Judge Boyer said that?

A. No.

Q. They did not?

A. Because anything they wanted to say they were overruled.

Q. You mean they just sat there?

A. They couldn't do anything.

Q. Now, Miss Patterson, did you ever tell that to anybody else before?

A. Yes, I did.

Q. Where and when?

A. Well, my sister knew it.

Q. I said did you ever tell that to anybody else about what took (390) place?

A. Yes, I told Mr. Goodling.

Q. Did you tell any official about it?

A. No, I didn't tell any official about it. He said he knew Judge Boyer very well and he also knew Judge Keller; he also knew Mr. Biester. He called him by his first name.

Q. Miss Patterson, how was the jury brought in in the morning; how did they come in?

A. How did they come in? They walked in.

Q. Did they come in through the main corridors the same way you came in, or did they come in through a side door?

A. They came in through a side door.

Q. How about the defendants; how did they come in?

A. They came in, I believe, from another door in the side.

Q. Also ——

A. Like in the middle.

Q. At no time was the jury or the defendants taken through the spectators that were there in the courtroom, isn't that correct?

A. No, that is right.

Q. Where were you seated during the trial?

A. I was seated in the first seat. I think the seats were reserved for jurors, the front, and I was in the first row with Mr. and Mrs Zietz.

Q. The first row—behind whom were you seated—behind the jury or behind the defense table?

A. I wasn't anywhere—I was seated on the opposite side of the room.

Q. Did you sit in approximately the same location every day?

(391) A. Every day I got the same seat.

Q. You had no difficulty getting a seat?

A. No, I didn't have any difficulty getting a heat.

Q. Was the courtroom crowded?

A. Sometimes, and sometimes it was not.

Q. Sometimes it was not. How many times was it not crowded?

A. Quite a number of times.

Q. Miss Patterson. Just one or two other questions. You say you are presently living in Margate, New Jersey. What is your address?

A. 106 South Union Aevnue.

Q. How long have you lived there?

A. Twelve years.

Q. Where did you live before?

A. I lived in Philadelphia.

Q. Now you say that your are the aunt, I believe ——

A. That is correct.

Q. —of Zietz ——

A. Harry Zietz.

Q. —is that correct? Where did you live when you lived in Philadelphia?

A. 929 Fulcrod Street in Frankford. I sold my home there one year after the tragedy.

BY MR. MARGIOTTI: After what?

BY THE WITNESS: After the tragedy of the boy.

BY MR. VAN ARTSDALEN:

Q. How long have you lived in Margate, New Jersey?

(392) A. Twelve years.

Q. But you had a home down in Philadelphia during some of the period of that time?

A. No, I sold it. No, we left Philadelphia and I sold my home in Philadelphia in 1948, but I had never been back to it.

Q. You say your sister was in the courtroom with you. That would be Mr. Zietz's mother?

A. That is right; Mr. and Mrs. Zietz.

Q. Was that at all the sessions—all of the sessions?

A. All the sessions; every session; day and night.

Q. You were present while the jury was being selected?

A. No, I was not.

Q. You were not there during that period?

A. No.

Q. Where did you stay while the jury was being selected?

A. The first night I told you I stayed over at the Doylestown Inn.

Q. Were you in Doylestown while the jury was being selected?

A. No, I was not. I came to Doylestown the day before the trial started in the court.

Q. The trial started on Monday, the actual trial?

A. Yes sir. I came to Doylestown on Sunday on a bus.

Q. Well, the jury had already been selected when you first went there?

A. Yes sir.

Q. Can you tell us what day it was?

A. No, I can't. My sister was in Doylestown two weeks before that.

BY JUDGE MURPHY: Did you come to Doylestown on Memorial Day?

(393) BY THE WITNESS: Yes, I did.

BY JUDGE MURPHY: That would be a week after. The trial started on the 24th. The first Sunday after the jury was selected was Memorial Day. Where do you go from there?

It is now 12:35. We will recess until 2:00 o'clock.

(Recess.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

BY MR. MARGIOTTI: May I present a motion to amend the Petition in accordance with my oral application yesterday. I furnished a copy to the Commonwealth. We are adding after the word "town" "and Bucks County."

BY JUDGE MURPHY: All right. What is the Commonwealth's position?

BY MR. RYDER: The Commonwealth objects to the amendment on the ground that the scope of this hearing is pretty well set forth on Page 409, 203 F. 2d 407, in which it is stated:

"The majority of the court is of the opinion that the relator must be afforded the opportunity to prove the allegations set out in his petition for habeas corpus insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at his trial * * *"

BY JUDGE MURPHY: Well, of course, we are following out the Mandate and if we don't allow the amendment it would go up to the Circuit Court and they could send it back and start all over—if we (394) don't allow the amendment. What they say in the first place is the hysteria

swept the town. If it gets into the air waves it may sweep all over. In order to get into the town it may come in from out yonder. They say during the trial jurors come from ——. Except with the amendment the same thing is before us. It is tweedle dum and tweedle dee.

BY MR. RYDER: We have stated our position.

BY JUDGE MURPHY: We will alolw the amendment because I don't think it changes the situation materially.

I might say here our interpretation is no matter what happened out there, it has to do harm down here in the town in order to have an unconstitutional trial and, therefore, ultimately it is the town from the earthland out yonder.

BY MR. MARGIOTTI: Just take the chair, Miss Patterson.

BY JUDGE MURPHY: You don't have any Order here ——

BY MR MARGIOTTI: I beg your pardon!

BY JUDGE MURPHY: Well, we will just put down on the bottom "Motion allowed."

BY MR. MARGIOTTI: Thank you.

MISS A. PATTERSON, recalled.

CROSS-EXAMINATION (continued).

BY MR. VAN ARTSDALEN:

Q. Miss Patterson, you said your name was A. Patterson. What is (395) your full name?

Miss Agnes L. Patterson.

Q. You testified, I believe, you came to Doylestown on Sunday?

A. I believe—wait a minute! I think it was Decoration Day.

Q. It was Decoration Day. I believe Decoration Day was on Sunday.

A. That is right.

Q. And was there any court the next day after you came?

A. Yes, the court was the next morning.

Q. Now, Miss Patterson, if I say to you the records indicate the court did not convene on Monday, June 1, would you still say there was court on that Monday?

A. As far as I can remember.

BY JUDGE MURPHY: The record says there was not. Memorial Day fell on Sunday and was celebrated by the court on Monday, and when the court adjourned on Saturday it adjourned to meet on Tuesday.

BY THE WITNESS: It was the first day of the court.

BY MR. VAN ARTSDALEN:

Q. You say the first day of the court. Do you mean you came there the first day the trial itself commenced?

A. Yes sir.

Q. You are positive of that?

A. I am positive of that.

Q. Now the records indicate that the trial itself started after the jury was selected Thursday, May 27. Were you in Doylestown before Memorial Day?

A. I was in Doylestown after Momorial Day.

Q. And not before?

A. No.

(396) Q. How many days of trial did you actually go to court?

A. Monday, Tuesday, Wednesday and Thursday.

Q. Again I call your attention to the fact there was no court on Monday.

A. Then it was Tuesday, Wednesday and Thursday.

Q. Were you there when the verdict came in?

A. No, I was not.

Q. What—when you came into court do you remember who the first witness was that was called?

A. No, I can't remember that.

Q. Was there a man brought in in a wheelchair—the first witness brought in in a wheelchair?

A. I remember the man in the wheelchair.

Q. Was he the first witness that was called when you came in?

A. I don't believe.

Q. Do you know whether his name was Allen Hellerman?

A. That was the name.

Q. If I say to you the record indicates that Allen Hellerman was the first witness called on June 1, 1948, would that refresh your recollection?

A. Well, that would be ——

BY MR. MARGIOTTI: There was no court on June 1.

BY JUDGE MURPHY: Decoration Day falls on the 30th of the month. There are thirty-one days in May. Monday, June 1; Tuesday, June 2.

BY MR. VAN ARTSDALEN:

Q. Would you agree Allen Hellerman was the first witness you heard called?

A. Hellerman—wasn't it?

(397) Q. Yes.

A. Yes.

Q. That was the first witness you heard called?

A. Yes.

Q. So that if there were any witnesses called before that date you didn't hear them testify?

A. No, I did not.

Q. Now then, you testified you got a room at the Doylestown Inn?

A. That is right.

Q. On Memorial Day?

A. Yes.

Q. And that you were told you couldn't stay there because there was going to be a jury—what was it?

A. They were there.

Q. The jury was there at the time?

A. Yes.

Q. How was it they gave you a room if the jury was there at the time?

A. They gave me a room because they had a vacant room for one night. They said I could stay because I was from out of town but I would have to get another hotel.

Q. So that the jury was already there?

A. Yes.

Q. Isn't it a fact the trial was already in progress when you first arrived in Doylestown?

A. I don't recall that at all. I thought I was there the first day of the trial.

Q. And I think you testified at one time on direct examination you were there the second day before the trial?

A. No, I did not say I was there before the trial.

(398) Q. Well did you come there on Sunday or did you come there the second day before the trial?

A. As far as I remember, it was either Decoration Day or Sunday. I really think it was on Decoration Day.

BY JUDGE MURPHY: Well, May 30 would be Decoration Day and would be celebrated on Monday. That is the 31st.

BY THE WITNESS: It was Decoration Day because I remember I was afraid I wouldn't be able to get a bus. I had to make connections.

BY MR. VAN ARTSDALEN:

Q. Why did you come to Doylestown at that particular time?

A. I came so that I would be in Doylestown for the opening of the trial.

Q. You knew the jury had been selected?

A. Yes, because Mrs. Zietz was there two weeks previous to that.

Q. You had been informed of that?

A. The jury was at the Doylestown Inn. They were registered there and they were eating there.

Q. You didn't know that beore you came to town?

A. I saw them in the dining room.

Q. You came to Doylestown as a result of the information that you received from Mrs. Zietz?

A. No, I didn't get any information from Mrs. Zietz.

Q. From whom did you get the information the jury had been selected?

A. Well, I knew the trial was the next day. The jury would have to be selected.

Q. Madam, the record indicates it took several days to select the jury. You said you were there during that period of time.

A. I wasn't there in Doylestown while they were selecting the jury.

(399) Q. How did you know when the jury was selected, how did you know when the trial was going to commence, as you said?

A. Because a friend whom we know in Philadelphia that knew a man here in Doylestown, called me from Pleasantville to tell me the trial was going to commence and I should go up.

Q. It was as a result of information you received from someone?

A. Yes.

Q. Where did you go when—what was the last day you attended any of the trial?

A. The last day I attended any of the trial was on a Thursday.

Q. A Thursday. Was that an evening session or afternoon session?

A. It was the afternoon session.

Q. And where did you go after that?

A. I went to the hotel and went to my room.

Q. When did you check out?

A. We checked out on Friday. We took my sister down to Wildwood on Friday.

Q. Was that Friday morning or afternoon?

A. Well, Friday about noon.

Q. At that time the verdict had not been rendered yet?

A. Oh yes, the verdict had been rendered.

Q. You say you know the verdict had been rendered before you left Doylestown?

A. Yes.

Q. What time did you leave Doylestown?

A. We left Doylestown in the afternoon sometime. I don't know (400) exactly the minute.

Q. I think you testified you stayed at the Fountain House after the first night you were at the Doylestown Inn: is that correct?

A. That is right.

Q. Now you testified you saw the jury in the dining room. What dining room was that, please?

A. In the Doylestown Inn.

Q. On what day?

A. On the first day I arrived in Doylestown.

Q. And were there not uniformed tipstaffs in charge of them?

A. I didn't notice them. They were at a long table in the back of the dining room.

Q. Separate from anyone else?

A. Yes sir. They also told me I would have to wait some time for my dinner because the jurors were getting served and they got served first.

Q. And apart from anyone else?

A. Yes sir.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Miss Patterson, this incident in which your said some children appeared from the schools or high schools ——

A. Yes.

Q. Do you remember what day that occurred?

A. It was several days.

Q. Do you remember the day it was you attributed those remarks to Judge Boyer that you testified to this morning?

A. I would say it was on Wednesday.

(401) Q. Wednesday?

A. Yes sir, because I was not in the court the next day.

Q. That would be the second day of June?

A. Tuesday was the first, yes.

BY MR. MARGIOTTI: That is all for the time being.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. I have a couple of questions. You say this occasion that Judge Boyer spoke to the children on Wednesday ——

A. Yes sir.

Q. You fix that because you weren't in court on Thursday; is that correct?

A. As far as I can remember, I know the children were in two or three days. I know the day that the judge was lecturing I couldn't hear what the judge was saying.

Q. Well, you have testified what the judge said?

A. I know—I couldn't hear the other part of it because the children were talking.

Q. You were not in court on Friday; you testified to that?

A. As far as I can remember, yes.

Q. Take your time. I don't want you to say anything that is not correct. Court started on Tuesday. Were you there on Tuesday?

A. Yes sir.

Q. This statement you attributed to Judge Boyer occurred on Wednesday?

A. Yes sir.

Q. You testified you were not in court on Thursday?

A. No.

(402) Q. Or on Friday?

A. I was in court on Thursday until my sister was taken out and I went with her.

Q. When was that?

A. Thursday.

Q. What time?

A. After we came from lunch.

Q. in the afternoon?

A. It was right after we came from lunch.

Q. Why did you testify on direct-examination that you weren't in court on Thursday?

BY MR. MARGIOTTI: We object. That is not what she said.

BY JUDGE MURPHY: The objection is overruled.

BY THE WITNESS:

A. Because I was confused about the day Monday.

BY MR. VAN ARTSDALEN:

Q. All right. Then you were in court on Tuesday, Wed-

nesday and Thursday morning and part of Thursday aft noon?

A. Yes sir.

Q. Is that all you were in court during the trial?

A. Yes sir.

BY JUDGE MURPHY: If you weren't there after yo sister had this attack and if you weren't there until Tu day when did you hear the District Attorney making a plea and asking for the death penalty?

BY THE WITNESS: He was talking to the jury.

BY JUDGE MURPHY: (403) When?

BY THE WITNESS: He was addressing the jury. Ev day he had something to say to them.

BY JUDGE MURPHY: While you were there you you heard him asking for the death penalty?

BY THE WITNESS: Yes sir.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Will you state whether or not that was before. t crippled man was brought into the courtroom, or after?

A. It was after.

Q. Were you there when the District Attorney oper his case to the jury?

A. Yes.

Q. You know who opened for the Commonwealth—do you know what I mean by "opening" ——

BY JUDGE MURPHY: What date does the record show the opening?

BY MR. VAN ARTSDALEN: I will get that in just a moment.

BY JUDGE MURPHY: Let's get the date. I want to follow you.

BY MR. VAN ARTSDALEN: The jury was sworn on the 28th, according to the record.

(404) BY JUDGE MURPHY: All right; that would be Friday.

BY MR. VAN ARTSDALEN: "Edward G. Biester opened the case for the Commonwealth the 28th at approximately 5:02 o'clock."

BY JUDGE MURPHY: You have yourself saying you didn't get there until the 30th and you heard the opening.

BY THE WITNESS: I know he spoke to the jury. I am sorry. I don't know very much about the courts. I know that the District Attorney Biester spoke and I know what he said.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

MR. W. LESTER TRAUCH, recalled.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Trauch, I want to show you "Relator's Exhibit No. 51" and show you a photostatic copy of the issue of the Doylestown Daily Intelligencer dated Friday afternoon, May 14, headed: "Four Murder And Four Manslaughter Trials Listed." Do you see it there in the center?

BY JUDGE MURPHY: What was the date?

BY MR. MARGIOTTI: 5-14-48.

BY THE WITNESS:

A. Yes, I see it.

BY MR. MARGIOTTI:

(405) Q. Do you know whether you wrote that article?

A. I do not.

Q. Do you know who wrote it?

A. It would be either Mr. Thomas or myself. But this story has so little color that I can't tell which one wrote it.

Q. What do you mean by "color"?

A. It has absolutely no description or anything, just plain matter of fact.

Q. There is no by-line to it?

A. No.

Q. I show you "Relator's Exhibit No. 55," and I refer you particularly to the issue of Monday afternoon, May 24,

1948, headed: "Feaster ville Murder Case Defendants Go On Trial." Can you tell me who wrote that?

A. No, I can't.

Q. All right. You didn't write it?

A. I can't tell you, sir.

Q. All right, sir.

BY MR. MARGIOTTI: That is all.

BY THE COURT: Any cross-examination?

BY MR. VAN ARTSDALEN: No sir.

(Witness excused.)

MR. A. RUSSELL THOMAS, recalled.

RE-DIRECT EXAMINATION:

BY MR. MARGIOTTI:

Q. Mr. Thomas, I show you "Relator's Exhibit No. 51," being the issue of your paper of Friday afternoon, May 14, 1948, and a (406) story headline: "Four Murder And Four Manslaughter Trials Listed." Will you look that over and tell me, if you recall, whether you or who wrote that article?

A. Well, for a positive answer I can hardly tell. This is part of the preliminary to the opening and a lot of these stories like this one were probably phoned in from the courthouse to a re-write man on the desk. I can't tell from the style of writing whether it was mine or not. It was just a routine story taken from the court calendar.

Q. This exhibit is in evidence and I am going to call your attention only to a certain phase of it and ask you if you know where this information would come from: "Four murder cases are listed on the docket for the May term of county criminal court that opens next Monday, but only two will be tried during the approaching term?"

A. Well, that information could come from the District Attorney, Mr. Biester, who I also asked questions. It could come from the Clerk of the Quarter Sessions. "Only two will be tried"—that certainly should come from the District Attorney's office, and I think it did.

BY JUDGE MURPHY: Do you know?

BY THE WITNESS: I would say yes.

BY MR. MARGIOTTI:

Q. I show you "Relator's Exhibit No. 55," being a photostatic copy of the front page of your paper of Monday afternoon dated May 24, 1948, the headline being: "Feasterville Murder Case Defendants Go On Trial." Now do you know who wrote that article?

(407) A. I believe I wrote that article. I am not certain but I will say that I believe I did.

Q. I observe in the article a statement stating: "The Feasterville Tavern murder cases got under way this morning in county criminal court * * * Only two of the defendants charged with the murder will go on trial this term." Where did you get that information?

A. Well, I certainly got it in the courtroom that morning that I wrote the story. I don't know what individual I got it from.

Q. Well, do you know or how it happened that the Darcy

case was also tried that particular term, to wit, beginning June 7—I believe was the date—1948?

A. I have no regular way of knowing it; only from the information I received I was led to believe ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: You are asked do you know? Do you know why they did it?

BY THE WITNESS: I will say no.

BY MR. MARGIOTTI:

Q. Information received from whom?

A. Who I might have asked ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it.

BY MR. MARGIOTTI:

Q. Did you receive any information from any public official or any source in authority?

(408) A. I can't tell you who from. But I certainly wouldn't make that statement unless I asked the District Attorney or somebody.

BY JUDGE MURPHY: Answer the question. Did anyone tell you why they called the Darcy trial when they called it?

BY THE WITNESS: No.

BY MR. MARGIOTTI:

Q. Did you at any time publish any reason in any of these exhibits that are here in Court—did you publish any reason for his calling the Darcy trial on June 7?

A. Not that I can recall, Mr. Margiotti.

Q. All right; that answers the question. Now I show you "Relator's Exhibit No. 93," and I call your attention to that part of the exhibit that says: "We Noticed." Do you know who writes that headline—who writes that line?

A. You mean the contents underneath the headline ——

Q. Yes.

A. Well, we all wrote that; anybody on the staff.

Q. I see ——

BY JUDGE MURPHY: What is the date of the issue?

BY MR. MARGIOTTI: Friday, June 11, 1948.

Q. Now I am going to ask you this: There appears under "We Noticed" the last item reading as follows:

"In a Philadelphia newspaper column, the following excerpt: 'So many murder trials are cluttering the Bucks county criminal docket that Doylestown High School graduates won't be able to hold their commencement exercises in the ancient court house. Instead they will be graduated outdoors.'" Do you see that?

A. I see that.

Q. Do you know in particular who wrote that?

A. I can not say definitely, Mr. Margiotti. I didn't myself.

Q. Will you state whether or not for the week of June 7, 1948 the graduation exercises for the Doylestown High School graduates was scheduled to be held in the big court house?

BY JUDGE MURPHY: If you know.

BY MR. MARGIOTTI: If you know.

BY THE WITNESS:

A. No. I don't know definitely. I would have to refer back to records or files or something. I don't know. I wouldn't want to say.

BY MR. MARGIOTTI:

Q. Do you know whether the exercises were held that year?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: It may throw light. I don't see how. But it may. We will take it. When did they graduate in their class at the Doylestown High School in 1948, if you know?

BY THE WITNESS: I can't give you the exact date. There was a graduation but I don't know when.

BY JUDGE MURPHY: (410) Do you know where the exercises were held?

BY THE WITNESS: Yes.

BY JUDGE MURPHY: Where?

BY THE WITNESS: They have been held every year. They have never been without a graduation.

BY JUDGE MURPHY: Where were they held?

BY THE WITNESS: I do not know.

BY MR. MARGIOTTI: That is all.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Thomas, when you wrote that article concerning the cases that were listed, that is there would be only two two cases listed; you wrote that on the basis of information you received?

A. That is correct.

Q. You don't know—you didn't know whether at that time the information was accurate or not?

A. I did not.

Q. And you still don't know at this time actually from whom you got that information?

A. That is right.

Q. Or whether it was obtained from any public official?

A. That is right.

BY MR. VAN ARTSDALEN: That is all.

(411) BY MR. MARGIOTTI: Will the Court grant me a few minutes?

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Thomas, I show you "Relator's Exhibit No. 16"——

BY JUDGE MURPHY: Date?

BY MR. MARGIOTTI:——being the date of December 26, 1947, the headline on the front page: "Murder Now Faces The Four Bandits." Will you state whether or not that is your article?

BY THE WITNESS:

A. Yes, it is. I didn't write the headline. I wrote the article.

BY MR. MARGIOTTI:

Q. I notice in the article this statement:

"Feeling Runs High

"The general feeling of the public—in Bucks county at least—appears to be that no time should be spared in bringing the youthful bandits to trial, and that it is a 'break' for society at large to have the trials in Bucks county rather than in Philadelphia." Did you ——.

A. May I see it a minute?

Q. Pardon me! The last part of what I read appears on the second page of that exhibit, about three or four lines.

BY JUDGE MURPHY: To keep the record straight, is there any second page to that exhibit, or is it a distinct number?

BY MR. MARGIOTTI: (412) Judge, as I have it here it is "Exhibit No. 16" and "Exhibit No. 17." "Exhibit No. 16" is the front page and "Exhibit No. 17" is a second page.

BY THE WITNESS:

A. I am going to answer that by saying this: That I am quite sure that I wrote most of that article. Whether I made that statement or wrote that paragraph where it said about the "break," or not, I am not quite certain because at that time we had an editor on our paper who sometimes put a little extra copy in the story and a little extra color. And it doesn't sound like me to put that in there. I would say I did not write that in it but it was written by someone in the office.

BY JUDGE MURPHY: What you call editorializing in his column.

BY THE WITNESS: That is right.

BY MR. MARGIOTTI:

Q. Well, did what you say refer to everything I have read that "Feeling Runs High," or was it only a part of that?

A. I am quite certain that I didn't comment editorially on any newspaper article I ever wrote on that trial, and I would say I did not write that part.

Q. It is your opinion that "Feeling Runs High" was written by your own editor?

A. It was written by someone in the office, not me.

Q. Not you?

A. Not me.

Q. Who was the editor at the time?
A. George S. Hotchkiss.
(413) Q. He is the man with the heart condition?
A. That is right.
Q. Now I show you "Relator's Exhibit No. 31." Will you tate now who wrote the editorial on the editorial page ntitled "Who'll Be The Next?" That is the paper of Monay, February 2, 1948.
A. Yes sir.
Q. And "Exhibit No. 31."
A. I can not say, Mr. Margiotti, because I did not see it vritten. I knew who wrote the editorials but I can't say ositively whether it was written by Mr. Hotchkiss or not. didn't write it.
Q. You didn't write it. Do you know particularly who handled the editorial that said: "It would be lamentable f citizens were forced to take the punishment of them into heir own hands?"
A. I don't know who wrote it. The man who wrote the rticle, I suppose. But I can't name him definitely.

BY MR. MARGIOTTI: That is all.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. I just want to ask you one general question. On any f these articles where you purport to quote what was aid in court are those quotes to the best—were they made ccurately at the time, to the best of your ability?
A. To the best of my ability.

BY MR. MARGIOTTI: There are some more articles. am just calling attention for cross-examination purposes.

(414) BY JUDGE MURPHY: We will read them all. They are in evidence.

BY MR. VAN ARTSDALEN:

Q. Mr. Thomas. I did want to call your attention to "Relator's Exhibits Nos. 98 and 99," an article headed: "Ask Death Penalty By The Darcy Jury," which is continued on later on "Relator's Exhibit No. 99," and ask you whether you wrote that article?

A. Yes, I wrote that.

Q. Mr. Thomas, in there there are various quotes attributed to the closing address of District Attorney Edward G. Biester. Did you write those quotations?

A. To the best of my ability.

Q. And do you recall whether or not that Mr. Biester said at the close of his speech:

"The responsibility is yours now: decide it on facts and not emotion. There is only one penalty for you to decide, and that is penalty of death?"

A. I remember that distinctly.

Q. And did Mr. Biester so state?

A. He did.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. And how many years of experience have you had in court reporting?

A. About thirty-five.

Q. How old are you?

A. I will be sixty my next birthday.

(415) Q. What education have you had?

A. Well, the tough way—well I graduated from high school and from a business college at Philadelphia and the rest was on newspaper experience since I was seventeen.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

MR. KNICKERBOCKER DAVIS, called and sworn on behalf of the Relator, on direct and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. What is your full name?

A. My first name is Leicester; my middle name is Knickerbocker; Davis is my last name.

Q. Where do you live?

A. I live in Doylestown.

Q. How long have you lived there?

A. I came to Doylestown on December 13, 1947.

Q. And have you been living in Doylestown since that date?

A. Yes sir.

Q. Do you remember the incident of the killing at Feasterville—the robbery and killing?

A. Yes sir.

Q. Do you remember the trials of Foster and Zietz?

A. Yes sir.

Q. And Darcy?

A. I remember Darcy not so well as the other two, but I was present, I think, one day at the Darcy trial.

(416) Q. I want you to state after it was brought to your attention that there had been a killing at the Feasterville Inn, what, if anything, did you do.

A. Well, I think perhaps I had better tell why I did what I did ——

Q. First, tell what you did and then you can tell why.

A. I contacted various people within the locality to ascertain their reactions to the impact of crime. I think you better know why I did that because I just didn't go out and do it wilfully ——

Q. Why did you do it?

A. I am a journalist, a magazine writer. I came to Doylestown in 1947 to complete a historical novel that I had started, and before that I had been a war correspondent.

Q. Before that you had been a war correspondent?

A. An accredited war correspondent in this country. I traveled 21,000 miles in twenty-four states and wrote upwards of a hundred articles on the various phases of the service.

Q. Were you in the service?

A. Lieutenant-Commander in the Temporary Reserve of the United States Coast Guard. My designation to active duty was as Public Relations Liaison Officer of the Fourth Naval District.

Q. What war was that?

A. World War II.

Q. Did you do anything in World War I?

A. In World War I I was recommended for a captain's commission in the Military Police. I passed my examination for it and I was told I was on the list for embarkment

immediately assigned overseas. The message was evil. I was ill throughout most of the war. I got well toward the end of the war, and I received word from the Chief of Staff that my commission was about to be granted but had been withheld because of the end of the war.

(417) Q. What was your purpose in making the survey?

A. I had long been intending—I had been vitally interested for a great many years in the causes of juvenile delinquency as they lead to youthful crimes of violence. I had had experience with police departments. In my work as journalist I had covered the Philadelphia Bureau of Police. I had been privileged to ride with the bandit patrols and see the police work in their various phases. I had broadcast. I was a news commentator at that time for the Public Ledger. I was the radio reporter ——

Q. The Public Ledger, Philadelphia?

A. Yes sir. Sunday photographer, rotogravure section, I was designated ——

Q. Let's get down to what you did.

A. I came up here to write an early American naval novel I had long been turning over in my mind throughout the years, probably evolving into a book on the responsibility of society as regards youthful crime.

Q. Let me ask you right here: At any time while you were making this survey, or whatever you call it, did you know anyone of the four defendants?

A. No sir. As individuals, to be perfectly truthful with you, I wasn't interested in them other than—I might differentiate—he had a share in part of this crime.

Q. In making the survey where did you go—what parts of the County?

A. I wanted to get in my mind—you must understand I wasn't doing this as a matter of record for any such thing as is taking place here—and I wanted to get an impression

of the public reaction to a thing of this sort, society's reaction, that could be used as background material to have what I wanted. I had lived in Bucks County before that from 1907 to 1925. I had—I thought I knew Bucks Countians pretty well. As a matter of fact, I (418) organized the Society for the Prevention of Cruelty to Animals in Bucks County and was the State Agent for the Society for the Prevention of Cruelty to Animals, and my work and animal prosecution cases before the Minor Judiciary took me all over the County. I made arrests. I have the power to make arrests——

Q. Arrests on that——

A. That took me all over Bucks County.

Q. That took you all over Bucks County.

A. I thought I knew Bucks Countians pretty well.

Q. Did you go to Feasterville?

A. No sir.

Q. Did you participate in getting the feeling in Feasterville?

A. No. To get the kind of reaction I wanted—I wanted to get an uncolored reaction; that is, I knew in Feasterville I would find——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it.

BY THE WITNESS: I felt in Feasterville I would get a very decided reaction. That wouldn't be a normal one, so far as what I wanted. So I confined myself to Doylestown and its environs, and I think I went out as far as New Hope and north for a bit, and gained certain impressions which I intend to use in my work. I certainly didn't intend them to be a record of this kind.

BY MR. MARGIOTTI:

Q. In your conversations in your work that you did did you converse with people?

A. Yes, I did.

(419) Q. And will you state whether or not those conversations related to the Feasterville killing and the responsibility therefor?

A. Yes, they were to obtain the information that I wanted. I didn't care to have them know I was questioning them for a record. I brought it up casually and obtained their reactions to it as best I could.

Q. In doing that about how many people did you interview in the County?

A. Well, I would say—I don't want to be too definite about it—I would say probably 100, probably 150.

Q. And in interviewing them did you precipitate the conversation by asking questions, or did they tell you things?

A. No, I wanted to get their reactions so I usually asked a question as to their opinion of the case, what they thought about it, and I thought it was pretty bad myself.

Q. Will you state what was said to you?

BY MR. VAN ARTSDALEN: I object to the conversations.

BY JUDGE MURPHY: We will take it subject to the objection.

BY MR. MARGIOTTI:

Q. What was said to you?

A. Well, six years is a good long time ago ——

Q. I don't want your exact words. Nobody can give

exact words. But the substance. As near as you can recall give the substance of the conversations.

(420). A. I should say the people I talked with were shocked, first of all, and outraged ——

Q. Go ahead.

A. —and I heard some wild talk—I think there has been plenty of it—that I didn't take too seriously. We certainly aren't a lynching community up there. I can't imagine anybody in Bucks County going out and lynching anybody. People may have said they would like to lynch them. I heard a lot of reckless statements ——.

Q. Tell us what you heard.

A. Mr. Margiotti, it would be very difficult to tell you word for word what I heard.

Q. Not word for word; in general what you heard.

A. I would say a large percentage of the people that I talked with were outraged and they thought there should be very drastic punishment meted out to these people. They would like to see it, certainly would have enjoyed seeing it themselves, I guess, some of them said.

Q. Was there anything said of any threatening nature?

A. You mean of participtaing in a mob scene ——

Q. Yes.

A. No, I don't think—I don't think Buck Countians would threaten anybody. They might say they would.

Q. What else was said about these boys?

A. I heard people say—I am remembering fragmentary conversations that may not be accurate over this period—there was reference made "Hope they would get the hot seat." "They would like (421) to see them taken out and shot." This was reckless talk. "They would like to see them strung up." I heard plenty of talk of that sort.

Q. What percentage of those people that you have interviewed would you say engaged in antagonistic talk against the defendant and others?

A. I was trying figure that out just last night, sir. I know that facts are very important things in cases of this kind, and I made a point within the last several days of querying seven people that I know—men that I know—that I had remembered one of them particularly at that time, the time of the murder and trial, had expressed himself, and I asked then, laughingly—do you wish me to say what I said to them?

BY JUDGE MURPHY: How he approached them if it refers back to the time of the trial.

BY THE WITNESS: Well, I opened my conversation with them by saying "Everybody is getting a soft spot on them up here? Are you getting one too?" They said they weren't; these particular people weren't. There has been a restoration of interest, of course, in this publicity given this present hearing, and these men were queried. I asked them if they felt now—they spoke rather varied, seven of them—if they felt now as they did in 1948 and 1947, and they said they did.

BY MR. MARGIOTTI:

Q. What did they say?

A. Well, there was one thing brought up by one man ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: What did they say back in 1947?

(422) BY THE WITNESS: I couldn't remember in 1947 what they said. I asked them if they felt now as they did then and how they felt now. They were varied in their ex-

pressions: Quite positive, four of them; three were not. There were seven.

BY MR. MARGIOTTI:

Q. What did they say?

A. Now ——

Q. Yes. You said they felt the same way as in 1947 and 1948.

A. I had one businessman say "I feel now as I did then God damn it, there shouldn't have been a trial." That is what he said within the last several days. I said "What do you mean 'There shouldn't have been a trial?'" He said, "They should have been taken out and shot."

BY JUDGE MURPHY: This is 1954, as I take it, in the month of March?

BY THE WITNESS: Yes sir.

BY MR. VAN ARTSDALEN: I assume my objection goes to all of these questions.

BY JUDGE MURPHY: Yes.

BY MR. MARGIOTTI: As I understand the witness, he is saying what the man said in the month of March.

BY JUDGE MURPHY: He says he has no recollection of what they said, and he is now coming into Court and violating the hearsay rule now saying what somebody he is not naming said to him—who can (423) be subpoenaed and brought here for cross-examination.

BY MR. MARGIOTTI: He is saying what somebody

told him in the month of March as to how he felt in 1947 and 1948.

BY JUDGE MURPHY: If he did, it would be hearsay and a statement of conclusion as to his feelings back there moved out of time and circumstance. That is what it amounts to. And the person subject to call and process, and the man knows his name, and can be called here for cross-examination. That is where we stand now. Proceed.

BY MR. MARGIOTTI:

Q. Without you answering this question—how many men have you interviewed in the last few days that have given you their feeling as it was in 1947 and 1948? Just answer how many.

A. Seven.

Q. And do you know the names of those seven men?

A. Yes sir.

Q. I see. Now don't answer this question until you are told to do so or not to do so by the Court and abide by the Court's ruling. Will you tell us what the seven men have said to you about how they felt in 1947 and 1948? Don't answer ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: Who had you go to these seven men?

BY THE WITNESS: Who had me go to these seven men ——

(424) BY JUDGE MURPHY: Yes sir.

BY THE WITNESS: No one, sir.

BY JUDGE MURPHY: You went of your own accord?

BY THE WITNESS: I went, sir, because ——

BY JUDGE MURPHY: I say—did you go of your own accord?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: At that time did you know you were to be a witness in this proceeding?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: When were you subpoenaed?

BY THE WITNESS: I don't remember the date.

BY JUDGE MURPHY: Are you engaged as an expert or as an ordinary witness?

BY THE WITNESS: I am acting as an ordinary witness, so far as ——

BY JUDGE MURPHY: You don't know?

BY THE WITNESS: I imagine I am acting as an ordinary witness.

BY JUDGE MURPHY: (425) You don't know; you haven't discussed it?

BY THE WITNESS: I don't know; no.

BY JUDGE MURPHY: After you get the subpoena you went around and talked to seven people?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: Those peoples' names you are ready to give the Court?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: Why shouldn't the Court have the benefit of those people? You are having this man interpret their feelings when they are available.
You object?

BY MR. VAN ARTSDALEN: Yes sir.

BY JUDGE MURPHY: The objection is sustained. We will be glad to hear those people but they ought to be subject to cross-examination.

BY MR. MARGIOTTI: All right.

Q. We will go back now to what the situation was up to the time of the Darcy trial; the 150 that you saw; what percentage——
A. I won't say 150.
Q. About?
A. Between 100 and 150.
Q. Of the ones you saw, what percentage would you say were (426) antagonistic to the defendant?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. What percentage would you say ——

BY JUDGE MURPHY: That is an attempt to have the witness state a conclusion without the basic facts which would be worthless.

BY MR. MARGIOTTI:

Q. Have you told all that those people told you, those 100 or 150?

A. Told all ——

Q. Yes.

A. All that I can remember.

Q. And what was—with reference to the conversations, how did they run over the County; were they any different in any locality?

A. Oh, I couldn't tell ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it.

BY THE WITNESS: I couldn't tell.

BY MR. MARGIOTTI:

Q. What was that?

A. I couldn't tell, sir.

Q. Have you told now in substance what they said?

A. Yes, I think so, as I can remember.

(427) Q. Take the percentage of the ones that you interviewed, what was the percentage that come within the

classification of those who made statements such as you have indicated?

A. I think it would be rather difficult to estimate over this period ——

Q. That you estimate ——

A. I should judge between 50 and 60, maybe 70%.

Q. Where were you during the Foster-Zietz trial?

A. I lived in Doylestown where I do now.

Q. Did you read the newspapers?

A. Yes, as thoroughly as I read them, many of them. Yes, I read them.

Q. Will you state whether or not the—there was any difference in the sentiment prior to the Foster-Zietz trial than it was during the Foster-Zietz trial?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained unless he gives basic facts upon which he is attempting to state a conclusion.

BY MR. MARGIOTTI:

Q. You were there during the Darcy trial?

A. I was there a very short time—one day I should think.

Q. And while you were there during the Darcy trial, did you talk to persons?

A. Well, I imagine I did, as you would talk—yes, I did—I can't recall the conversations.

Q. Yes. Now, Mr. Davis, will you state whether or not there was any difference in feeling between that existing during the Foster-Zietz trial and that existing during the Darcy trial?

(443) BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained. He can give basic facts.

BY MR. MARGIOTTI: This feeling that you have described in interviewing these various persons, will you state how long that existed?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained unless he shows that he knows and that is the reason for it and the basis. The witness is now asked how long did somebody have a feeling ——

BY MR. MARGIOTTI: I didn't ask him that. I am asking him how long that general feeling existed.

BY JUDGE MURPHY: The objection is sustained on the basis of the present state of the record.

BY JUDGE WATSON: What general feeling do you mean?

BY JUDGE MURPHY: The feeling he testified to.

BY JUDGE WATSON: I don't think he told what the feeling was.

BY JUDGE MURPHY: He said they thought punishment should be meted out; there was no mob; some said "They would like to see them taken out and shot and strung up."

BY MR. MARGIOTTI: That is what he said.

(429) BY JUDGE WATSON: That isn't sentiment.

BY MR. MARGIOTTI: That is what I call it.

BY JUDGE WATSON: I don't call that sentiment.

BY MR. MARGIOTTI: The Court has stated ——

BY JUDGE MURPHY: Out of a county where you have already shown there were 100,000 people the man says he talked to between 100 and 150, that he didn't go where he would get a normal reaction, he went elsewhere, and then he said that 50 to 60% of 100 to 150 out of 100,000 said something. That is where the record stands.

BY MR. MARGIOTTI: That is all he can testify to. That is all he did.

Q. Will you state whether or not you know when was the last time prior to the Foster-Zietz trial that anybody said—made statements to you such as you have already testified to?

A. I couldn't give an accurate answer to that, Mr. Margiotti.

Q. State how long before the Foster-Zietz trial it was approximately the last time that you heard statements such as you have already testified to.

A. I wouldn't want to say accurately. I couldn't say accurately.

Q. Did you hear any such statements during the Foster-Zietz trial?

A. As I have described ——

Q. Yes.

A. Yes, I did.

Q. And did you during the Darcy trial?

(430) A. Yes, I think so—I did.

Q. I want you to state whether or not you knew Judge Boyer.

A. Yes, I knew Judge Boyer and respected him a great deal.

Q. I want you to state whether you had any conversation with Judge Boyer concerning these cases.

BY JUDGE MURPHY: Now if you will make an offer—make an offer, Mr. Margiotti, please.

BY MR. MARGIOTTI: At sidebar?

BY JUDGE MURPHY: No.

BY MR. MARGIOTTI: Well, I propose to prove by the witness that he had conversations with Judge Boyer in which Judge Boyer expressed himself against the defendant and the other boys, that he was antagonistic to them, that he showed feeling against them and said that they were hardened criminals and that he resented a conversation about them, and sought to avoid the conversation.

BY JUDGE MURPHY: We now have a dead man, Judge Boyer, and an attempt to have this witness now speak the words of the dead man, but in view of the latitude we have allowed, we will let this witness answer the question notwithstanding Judge Boyer is not here to reply.

BY MR. VAN ARTSDALEN: We object.

BY JUDGE MURPHY: You object, and we will take it.

(431) BY THE WITNESS:

A. I had known Judge Boyer quite a while ——

BY JUDGE MURPHY: First of all, the time?

BY THE WITNESS: The time was at some time during, I would say—during the Zietz-Foster trial, as I can remember. I can't be too accurate about that. It was during the actions that were taking place ——

BY JUDGE MURPHY: During the Foster-Zietz trial — and the place?

BY THE WITNESS: I met Judge Boyer coming out of a movie one night, the County movie. As I say, I had known him a long time. I had a great respect for his ability ——

BY JUDGE MURPHY: Did they have night sessions during the trial?

BY THE WITNESS: It hadn't anything to do with that. He came out of the movie. I don't know what movie. I met him on State Street. I fell in step with him just for a moment. He and I had an exchange of words—I don't like being placed in the position here, Your Honor, of seeming to slander a dead man because I liked Judge Boyer very much ——

BY JUDGE MURPHY: Answer the question.

BY THE WITNESS: I am trying to recall his conversation as accurately as I can. I told him I had attended the trial with interest—that, as I remember, I told him that I

didn't think these two (432) boys that were on trial looked like the type of desperadoes that I had contacted in the journalistic work which brought me in contact with the underworld. I think Judge Boyer was irritable. I guess he thought I might be sticking up for them. As I remember, he was very sharp with me. He said, "I think they are young hardened criminals and callous criminals." I have never repeated that since until now.

BY JUDGE MURPHY: You didn't. How did Mr. Margiotti know it?

BY THE WITNESS: I told Mr. Margiotti, yes sir, but I have never spread—broadcast that by any means. I don't think there is anybody in Bucks County that can say they heard me repeat that.

BY MR. MARGIOTTI:

Q. What was Judge Boyer's reaction to the conversation —and demeanor?

A. I think he was probably annoyed at my bringing attention to the trial that was engrossing him. That is—I changed the conversation. In fact I left him shortly after.

Q. Did he show any resentment or anything like that?

A. I think he resented touching upon a subject which he was having a professional part in.

BY MR. MARGIOTTI: You may cross-examine.

CROSS-EXAMINATION

BY MR. VAN ARTSDALEN:

Q. Mr. Davis, this conversation you say you had with Honorable Judge Boyer, did that occur during the Foster-Zietz trial, before it or after it?

A. Mr. Van Artsdalen, I wouldn't say. It was my impression that (433) it was in the midst of the trial or shortly after. I think it was before the Darcy trial, as I remember.

Q. Do you recall what day of the week it was?

A. Oh, no. It was in the evening.

Q. You attended all the sessions of the Foster-Zietz trial?

A. No sir.

Q. You did not. You say you attended one day of the Darcy trial; is that correct?

A. Yes sir.

Q. Do you recall what day that was, sir?

A. No.

Q. Was it during one of the days in which evidence was being produced?

A. I don't remember that either, Mr. Van Artsdalen. I met "Mike" Achey at the hearing. I knew him quite well. I walked into the courtroom and I sat there for a while and I didn't even see this defendant's face. I saw the back of his head.

Q. I take it, therefore, the day you spent at the Darcy trial did not impress itself on your mind?

A. I wouldn't say, no.

Q. There was nothing unusual occurred during the time you were there at the trial; was there?

A. No sir.

Q. Any demonstrations or outbursts of any sort?

A. Oh, no.

Q. Did you have any difficulty finding a seat in the court room on the day you went into the Darcy trial?

A. The Darcy trial—I think it was filled above normal. I think all those trials were.

Q. You think they were?

(434) A. They were. I can't estimate what is a normal court attendance up there. I don't go to court too much.

BY JUDGE MURPHY: Read Mr. Van Artsdalen's question, Mr. Reporter.

(Question of Mr. Van Artsdalen read by the Reporter as follows: "Did you have any difficulty finding a seat in the courtroom on the day you went into the Darcy trial?")

BY THE WITNESS:

A. No.

BY MR. VAN ARTSDALEN:

Q. Do you recall how long you were in there on that day, Mr. Davis?

A. Oh, one-half hour maybe; maybe an hour; I don't recall.

Q. Now when was it you first told Mr. Margiotti about this conversation you say you had with Judge Boyer?

A. I think it was last evening—it was.

Q. You mean you had never told anybody about this conversation prior to that?

A. No sir, not to my recollection.

Q. Had you written anything about it?

A. Judge Boyer ——

Q. No. Had you written anything about these cases?

A. For publication ——

Q. Yes.

A. No sir.

Q. Have you ever written to Mr. Margiotti about this case?

A. Written to him about this case —

Q. Yes.

A. No.

Q. When were you first contacted by Mr. Margiotti or anyone from his office about this case?

(435) A. I received a call—I can't remember the date; maybe I have it in a diary somewhere; it was sometime ago—from a man who said he was an investigator.

Q. About how long ago, sir?

A. I don't know. The first contact about —

Q. Yes.

A. Oh, I would say six weeks ago—maybe longer.

Q. Had you expressed yourself publicly anywhere in the papers or anywhere else as to your investigations of this case?

A. You mean for this trial—this hearing —

Q. No, not for this hearing. Had you expressed yourself anywhere publicly?

A. I think I mentioned to people I was making a survey not only of Bucks County but of various areas to do this work. I think it would be a pretty big job. I think it would have gone beyond Bucks County.

Q. What books have you written, Mr. Davis?

A. I haven't written any books.

Q. What articles have you written?

A. I wrote, as I think I stated before upwards of 100 published feature articles during the war. Everybody's Weekly in the Philadelphia Inquirer. I was on twenty-seven weeks' assignment with them. I have written for the Ladies' Home Journal, women's magazine.

Q. How many articles for the Ladies' Home Journal?

A. I wouldn't say—probably over a period of years, four.

Q. What is your present occupation, sir?

A. I am writing a book—it is supposed to be.

Q. Are you employed by any firm?

A. No.

(436) Q. And you have been writing this book since coming to Bucks County in 1947?

A. Yes. I have started it. I had started it long before that. It is a historical novel, early American. It requires a great deal of research. We had the locale in Bucks County. I have been working very hard and I don't know when I will get it completed. Novels of that type, Mr. Van Artsdalen, take four or five years.

BY JUDGE MURPHY: What was the last thing that you wrote that was published?

BY THE WITNESS: There have been some minor articles ——

BY JUDGE MURPHY: How long since anything was published?

BY THE WITNESS: I would say a month.

BY JUDGE MURPHY: Where?

BY THE WITNESS: These minor articles were published in that little magazine they are sending out in our parts, "The Bucks County Traveler."

BY JUDGE MURPHY: How about outside Bucks County?

BY THE WITNESS: The last feature article I had published was in 1945 on detraining of war dogs.

(436a) BY JUDGE MURPHY: Where was that?

BY THE WITNESS: It was published in Collier's in April, 1945, entitled "The G. I. Dog Comes Home."

BY JUDGE MURPHY: What about before that?

BY THE WITNESS: Mostly the articles I write were for Everybody's Weekly.

BY JUDGE MURPHY: Before 1945 what was the last time you had something published outside of Bucks County?

BY THE WITNESS: I would have to look at my records.

BY JUDGE MURPHY: You don't have any recollection of any major work of yours. Can you recall the title of one major work of yours?

BY THE WITNESS: Published before 1945 —

BY JUDGE MURPHY: Yes sir—or ever.

BY THE WITNESS: Well, I wrote an article in 1938.

BY JUDGE MURPHY: What was that on?

BY THE WITNESS: That was for the Country Gentleman magazine. It was (437) entitled "Pilot-Bred." It was a play on bread.

BY JUDGE MURPHY: What was that about?

BY THE WITNESS: "Pilot-Bred"—the history of it was done for the Country Gentleman.

BY JUDGE MURPHY: What about before 1938—any other major work?

BY THE WITNESS: I wrote an article for the American magazine ——

BY JUDGE MURPHY: The year?

BY THE WITNESS: —on fire prevention.

BY JUDGE MURPHY: What date?

BY THE WITNESS: I can't remember the dates. Fire prevention through the training of youngsters to be conscious of fire hazards.

BY JUDGE MURPHY: Anything else?

BY THE WITNESS: Do you mean major articles?

BY JUDGE MURPHY: What do you call "major"? American magazine was one ——

BY THE WITNESS: (437a) I would say the articles I wrote for Everybody's Weekly were major.

BY JUDGE MURPHY: The American magazine was what year?

BY THE WITNESS: 1937.

BY JUDGE MURPHY: You said you worked for the Public Ledger. How long is that out of business?

BY THE WITNESS: I could tell you—the Public Ledger was discontinued first—it was in 1935, I think. I am not positive on this date.

BY JUDGE MURPHY: I have no other questions.

BY MR. VAN ARTSDALEN:

Q. Mr. Davis, you stated you also had some official capacity with the Society for the Prevention of Cruelty to Animals?

A. The Society for the Prevention of Cruelty to Animals ——

Q. Yes.

(438) A. I have been an agent—do you wish me to tell you what my duties are, what they embrace ——

BY MR. MARGIOTTI: Just answer his question.

BY MR. VAN ARTSDALEN:

Q. You were connected with the Society for the Prevention of Cruelty to Animals?

A. The Pennsylvania Society for the Prevention of Cruelty to Animales for forty years, I should say, as an agent.

Q. Are you still an agent for the Pennsylvania Society for the Prevention of Cruelty to Animals?

A. I am still an agent for the Pennsylvania Society for the Prevention of Cruelty to Animals.

Q. But weren't you also connected with the Bucks County Society for the Prevention of Cruelty to Animals?

A. I organized the Bucks County Society for the Prevention of Cruelty to Animals in 1912.

Q. And you have left that organization, is that correct?

A. Yes sir. I was its President and Field Secretary.

Q. In what year did you leave?

A. Did I leave ——

Q. Yes.

A. Oh my! About three years ago, I should say.

Q. And that was as a result of a dispute in the organization?

A. It was the result of a dispute over policies.

BY JUDGE MURPHY: We will take a ten-minute recess.

(Recess.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

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(439) MR. LEICESTER KNICKERBOCKER DAVIS, recalled.

CROSS-EXAMINATION (Continued).

BY MR. VAN ARTSDALEN:

Q. These persons that you spoke to about the case after the shooting, between what period of time did that take place?

A. I would say my interest was aroused almost immediately.

Q. Almost immediately. And for how long a period of

time—in other words, over how long a period of time then did you contact 100 or 150 people?

A. I would say up to the termination of the Dairey trial.

Q. You mean throughout that whole period?

A. Yes.

Q. Now I believe you stated you think it was during the Foster-Zietz trial you talked to Judge Boyer, is that correct?

A. I think it was.

Q. You talked to him, directly addressed him?

A. I expressed my interest in it. I said I had been up there and I unwisely made mention about the appearance of these two youths.

Q. I believe you said Judge Boyer resented any conversation about the case?

A. Well, he was pretty sharp.

Q. Did you consider at that time whether or not it was proper to speak to a judge about a case that was on trial?

A. No, I didn't. I didn't know about the legal ethics of such matters. I had known Judge Boyer over a good many years from the time he was District Attorney. I knew him as a member of the Historical Society. I knew Mrs. Boyer. I liked them both very much.

(440) Q. Where did you live before coming to Doylestown in 1947?

A. At Chestnut Hill. Before that I lived in Germantown in an apartment.

Q. And when did you first become acquainted with Judge Boyer?

A. He was District Attorney at that time, and as an agent of the Society for the Prevention of Cruelty to Animals I had arrested and prosecuted a person for an act of cruelty who appealed the verdict before the magistrate and took it to the courts in Doylestown, and I drove up and met District Attorney Boyer at that time. He was very cooperative.

Q. Were you a resident of Bucks County at that time?

A. Oh yes. I lived in Bucks County from 1907 until 1925.

Q. And you were familiar with court procedures prior to the Foster-Zietz trial, were you not?

A. As a layman, yes, roughly.

Q. Well now, between—I take it you first knew Judge Boyer sometime while he was District Attorney?

A. Yes sir.

Q. And around what year was that?

A. I don't know. It may have been around the year 1916. Now I am not positive on that at all.

Q. What I am trying to arrive at is were you particularly friendly with Judge Boyer from 1925, or whenever it may have been when you left Bucks County, up until the time that you returned to Bucks County in 1947?

A. You mean in the interim when I was away from Bucks County ——

Q. Yes.

A. I never saw him in that period.

Q. All right. Well then, as a judge you had no contact with Judge Boyer up until at least December 13, 1947, when you moved back (441) to Bucks County, is that correct?

A. The first contact I can't place the date. You may be able to place the date from this: I met Judge Boyer and Mrs. Boyer at a meeting of the Bucks County Historical Society, and it may place the date because he mentioned the forthcoming trial of Foster-Zietz at that time and he told me they were asking for a severance, as I remember—whatever that is.

Q. You didn't come in contact with him as Judge until you came back up to Bucks County in 1947?

A. No.

BY MR. VAN ARTSDALEN: All right; that is all.

RE-DIRECT EXAMINATION

BY MR. MARGIOTTI:

Q. Do you have any of those articles that you have written?

A. Yes sir.

Q. Let me see them.

A. These were picked at random. There are none of the newspaper feature articles there because they are all stored away.

Q. Let's take ——

A. This was an article for People and Places having to do with police radio calls. That is a picture story; very little there is to it. I have a journalist's rating as a photographer. I have just a few pages there.

Q. This article is entitled "Calling All Cars"?

A. Yes sir. These were taken ——

Q. Go back on the stand, please.

A. These were taken with the cooperation ——

Q. Don't answer that. This was your article?

A. That is my picture story.

(442) Q. This is your picture story.

BY MR. MARGIOTTI: We offer it in evidence.

BY JUDGE MURPHY: The legal purpose is what?

BY MR. MARGIOTTI: To substantiate the witness when he says he wrote articles for magazines since he has been questioned and interrogated on that subject by Your Honor and also by the District Attorney.

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained if that is the only purpose.

BY MR. MARGIOTTI: And for the purpose of showing his occupation and throwing light on his background.

BY JUDGE MURPHY: The objection is sustained if it is for that purpose, the fact he wrote a magazine article "Calling All Cars"—somebody took the pictures ——

BY THE WITNESS: I took the pictures.

BY JUDGE MURPHY: You took the pictures?

BY THE WITNESS: Yes.

BY JUDGE MURPHY: "Calling All Cars!—What Happens When You Call A Cop (443) In Philadelphia." We sustain the objection. We don't see how it can add any help, good, bad or indifferent, to this case.

BY THE WITNESS: That is a picture story illustrating a story, my photography. I was sent on an assignment to take that.

BY JUDGE MURPHY: The issue in question is "People And Places" and it is dated November 1, 1940. So that fourteen years ago, he wrote this article which consists of six paragraphs.

(People And Places Magazine marked "Relator's Exhibit No. 125"; Country Gentleman Magazine marked "Relator's Exhibit No. 126".)

BY MR. MARGIOTTI:

Q. Will you state whether or not you wrote this story in the Country Gentleman?

A. That is a picture story. The article I did not write the text.

Q. You merely took the pictures?

A. I was sent out. It was an assignment to take the pictures.

Q. But you didn't write the article?

A. No sir.

Q. Is there any article in that magazine you are holding?

A. Yes sir.

Q. Let me see it.

A. I will testify to it.

BY MR. MARGIOTTI: Your Honor, I had marked "No. 126" which I would like to withdraw because it is simply a picture story and it isn't a written article.

BY THE WITNESS: This is an article carrying a dual by-line with my (444) wife, who is an accredited war correspondent. The pictures were taken under my direction by Ifor Thomas. I wrote it and my wife was given a by-line on it with me. That was April, 1945.

(Collier's Magazine marked "Relator's Exhibit No. 127".)

BY MR. MARGIOTTI: At this time I offer in evidence "Relator's Exhibit No. 127", being Collier's Magazine of April 14, 1945, containing an article "The G. I. Dog Comes Home", by Grace and Knickerbocker Davis. I would like to show this to the Court.

BY MR. VAN ARTSDALEN: That is objected to.

BY JUDGE MURPHY: The item in question consists of

four paragraphs on one page together with a substantial part of two pages pictures of dogs and men and human beings with them. The objection is sustained. We don't see that it can add anything in this proceeding.

BY MR. MARGIOTTI: I think it throws some light upon the truthfulness of the witness in writing articles.

BY JUDGE MURPHY: There is no doubt about it. He apparently wrote articles about seeing-eye dogs and police calls. The question here is what happened at Bucks County at this time.

BY THE WITNESS: This is a short article about the Army newspaper ——

BY MR. MARGIOTTI:

Q. Who is that by?

A. This was a picture story by me, the same as that in Collier's.

(445) (Collier's Magazine marked "Relator's Exhibit No 128".)

BY MR. MARGIOTTI: Page 40, Collier's of September 13, 1941, an article entitled "Our New Army".

BY MR. VAN ARTSDALEN: I object to that.

BY MR. MARGIOTTI: Page 40, Judge.

BY JUDGE MURPHY: The article in question is headed "Our New Army". There is a heading "New Jersey", "Massachusetts", "New Hampshire", "Maryland", "Virginia", "North Carolina", "Georgia", and it ends up in

"Recoil". We apoligize for that fernicrantz report. Everything's resartus. Comma?"

The objection is sustained.

BY MR. MARGIOTTI:

Q. Do you have with you any letters showing any other employment?

A. Yes sir.

Q. Let me see them.

A. This is an article that was written on Bucks County in Bucks County.

Q. Point to it.

(Commonwealth Magazine marked "Relator's Exhibit No. 129".)

BY MR. MARGIOTTI: We offer in evidence "Commonwealth, The Magazine For Pennsylvania", "Relator's Exhibit No. 129", the article on Bucks County, the witness being the author of the article. The date is Winter of 1950.

MR. VAN ARTSDALEN: That is objected to.

(446) BY JUDGE MURPHY: At least this article is about Bucks County and it may possibly add some light. We will receive it in evidence. It is about the county where this affair occurred. We will take it.

BY MR. MARGIOTTI: All right.

Q. Now, Mr. Davis, were you at any time connected with the Fourth Naval District of Pennsylvania of the United States at Philadelphia?

A. I was brought into the Temporary Reserve of the Coast Guard as a Lieutenant Senior Grade.

Q. When was that?

A. In 1945.

Q. O K.

BY JUDGE MURPHY: Were you on the payroll?

BY THE WITNESS: No sir; I served without pay.

BY MR. MARGIOTTI:

Q. Will you state ——

BY JUDGE MURPHY: —Now there is some evidence of that here. But if there is any question about it, I would offer it.

BY MR. MARGIOTTI: I have some evidence, that is correct. There is some evidence. If there is any controversy about it, I will offer the evidence.

BY JUDGE MURPHY: Sir, we will pass on the record as made in this Court.

BY MR. MARGIOTTI: (447) All right.

BY JUDGE MURPHY: Are there any more witnesses to be called today?

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: We will only go to 4:30 and we would like to go on to 4:30 if there are other witnesses. We have got to get finished at some time or other.

BY MR. MARGIOTTI: I am sure we will be through at

noon, which is a little faster than I anticipated this morning.

(Letter of United States Coast Guard marked "Relator's Exhibit No. 130"; Letter of Fourth Naval District marked "Relator's Exhibit No. 131".)

BY MR. MARGIOTTI: We offer in evidence "Relator's Exhibit No. 130" and "Relator's Exhibit No. 131", showing the witness' connection with the United States Coast Guard as a Lieutenant and his connection with the Fourth Naval District, Philadelphia.

BY MR. VAN ARTSDALEN: The offer is objected to.

BY JUDGE MURPHY: Well, this letter is dated July 25, 1944, and it is written to Mr. and Mrs. Knickerbocker Davis:

"Dear Mr. and Mrs. Davis:

"This office has been advised that you have been fully cleared by investigation of Personnel Security Questionnaires and are now eligible for future authorizations to visit Naval establishments, upon specific request."

And it is signed by the District Public Relations Officer.

(449) Another letter is dated March 10, 1945. It is addressed to Lieutenant (T) Knickerbocker Davis, USCGR.

"Subj: Assignment to active duty; designation as Coast Guard Public Relations Liaison Officer, 4th ND.

"1. Having been appointed a Lieutenant (T) in the Coast Guard Reserve, you are hereby designated as Coast Guard Public Relations Liaison Officer, 4th ND, officiating as such without pay.

"2. As Public Relations Liaison Officer you will be expected to give such time as you can spare from your private affairs to the maintaining of satisfactory working relations

between the Coast Guard Public Relations office of the District and those of the Army, Navy and Marine Corps, together with public broadcasting stations, publications of general circulation, promotional agencies, and the press.

"3. Such feature articles, or other material, as you may prepare for publication as a member of the Temporary Reserve and for which you may receive no remuneration, and any suggestions you may have for broadcasts, magazine articles, press releases, etc., are to be submitted to the DCGO 4th ND before promulgation.

"(Signed) Captain, USCG."

So that they are in the record for whatever light they add.

BY MR. MARGIOTTI:

Q. Will you state whether or not you held any other position, (449) any other public position, in Bucks County?

A. Public position ——

Q. Yes.

A. Mr. Van Artsdalen mentioned the Bucks County Society for the Prevention of Cruelty to Animals. Is that a public position?

Q. I have in mind more particularly the position of Coordinator in the Civil Defense.

A. I was appointed by Judge Hiram Keller—I imagine that is the appointment you hold there—as Executive Officer for the County Civil Defense Council.

Q. When were you so appointed?

A. The date is on the appointment, sir.

Q. All right.

A. 4 August, 1950.

(Letter of Judge Hiram Keller marked "Relator's Exhibit No. 132".)

BY MR. MARGIOTTI: We offer in evidence a letter ——

Q. Whose signature is this on the letter; is that Judge Keller's signature?

A. Yes, sir.

BY MR. MARGIOTTI: —a letter marked "Relator's Exhibit No. 132" in which the witness is appointed Defense Coordinator for Bucks County.

BY THE WITNESS: Executive.

BY MR. MARGIOTTI: Executive Defense Coordinator with the County Defense Council by Judge Keller.

BY MR. VAN ARTSDALEN: (450) That is objected to.

BY JUDGE MURPHY: We will take it for whatever light it can add on this question.

BY MR. MARGIOTTI:

Q. When did you first meet me?

A. Meet you, Mr. Margiotti ——

Q. Yes.

A. It was a very short time ago. I am trying to recall it.

Q. Was it during this hearing?

A. Yes sir.

Q. And do you know how the Relator in this case or his attorneys got word concerning you or became acquainted with you, got to know about you?

A. No sir, other than I received a call from an investigator, I don't know who, that he said he was an investigator for the Charters Company; I don't remember the name.

Q. From where?

A. I think the investigator is present in the courtroom here.

Q. Is he here?

A. I don't remember the spelling.

BY JUDGE MURPHY: He said to you what company, as best you recall it?

BY THE WITNESS: He told me he was an investigator of this company that I remember he called the Charters Co. He is standing back there by the window.

BY MR. MARGIOTTI:

Q. Did he tell you how he got your name?

BY MR. VAN ARTSDALEN: (451) I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI: They have thrown a lot of implications on the part of the Relator's side ——

BY JUDGE MURPHY: It is all right. The man has stood up in Court and has been identified. What you are doing is trying to get hearsay in without subject to cross-examination.

BY MR. MARGIOTTI: So far as that gentleman is concerned, he is going to appear as a witness.

BY JUDGE MURPHY: The objection is sustained. The man is here; the man is available.

BY MR. MARGIOTTI:

Q. Were you subpoenaed thereafter?

A. Yes, sometime after that.

Q. Sometime after that. And last evening was the first time you told the story to me?

A. Yes sir.

Q. And that was at the Casey Hotel, was it?

A. Yes sir.

Q. In these various stories that you heard up to and including the Darcy trial, did you hear any references that applied to the location where the defendants came from?

A. I did—I quite don't understand your question ——

Q. Did you hear anything said concerning the fact that they were from out of Bucks County?

(452) Yes, I did.

Q. What did you hear?

A. Well, that "The criminals can not come into Bucks County and commit crimes."

Q. Is that all you heard?

A. Well, "They would be pretty sharply dealt with" was the implication I did hear. I can't remember exactly what I heard ——

BY MR. VAN ARTSDALEN: I object, not responsive.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. I want what was said; I don't want a conclusion on your part; the substance of what was said about people that came into Bucks County and committed crimes.

A. I can't remember.

BY MR. MARGIOTTI: That is all.

RE-CROSS EXAMINATION

BY MR. VAN ARTSDALEN:

Q. Mr. Davis, you are no longer connected with Civil Defense in Bucks County, are you?

A. No sir, I have my accepted resignation with those other papers from Judge Keller.

Q. When did you resign?

A. It is on the date of the acceptance of the resignation that Mr. Margiotti has.

Q. Can you recall when it was?

A. Oh my, I don't know how long I was in there. Can I present that acceptance of the resignation by Judge Keller? You are (453) asking me some pretty nebulous questions.

BY JUDGE MURPHY: The witness has asked to use a paper to refresh his recollection.

BY MR. VAN ARTSDALEN: I have no objection to that if it is available.

BY THE WITNESS: It was acknowledged on the 7th: resignation sent on the 6th, 1950.

BY MR. VAN ARTSDALEN:

Q. The 6th of what?

A. November 6th.

Q. You accepted the job on August 1, 1950?

BY MR. MARGIOTTI: That is already in the record.

BY THE WITNESS:

A. I am trying to find out the date of the letter in which I got my appointment.

BY MR. VAN ARTSDALEN:

Q. I think you testified on direct examination it was on August 1, 1950, you were so appointed?

A. I imagine so, yes.

Q. It was a period of about three or four months then that you were connected with the Bucks County Civil Defense?

A. If that is it, yes.

Q. Was your resignation due to a dispute as to policy?

A. No sir. I will modify that. There was no active dispute. Colonel Heritage ——

Q. There was a difference of opinion, is that right?

A. Yes sir.

BY MR. VAN ARTSDALEN: That is all.

(454) RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Will you state whether or not that letter in which the resignation was accepted states the nature of the controversy?

A. No sir. Here it is.

Q. Is that a letter signed by Judge Keller?

BY JUDGE MURPHY: You are going into the contents. Wouldn't it be a good idea to mark it "Relator's Exhibit No. 133 ——

BY MR. MARGIOTTI: That is just exactly what I am doing.

BY JUDGE MURPHY: —if it adds any light at all?

(Letter of Judge Keller marked "Relator's Exhibit No 133.")

BY MR. MARGIOTTI: If the Court please, we offer in evidence "Relator's Exhibit No. 133," being the acceptance of the resignation.

BY JUDGE MURPHY: It will be received for whatever light it might possibly throw.

(Letter of Civil Defense Council marked "Relator's Exhibit No. 134.")

BY MR. MARGIOTTI: What was the date of that, Judge?

Q. On October 8, 1951 will you state whether you were given an appointment by the Executive Officer of the Borough of New Hope?

(455) A. Yes sir.

Q. And how long—did you take that appoint?

A. It was understood it was for a very short term to help them with public information, and they appointed me as Public Informatoin Officer of this.

Q. How long did you keep that?

A. About a month. It was to execute some specific pieces of work.

BY MR. MARGIOTTI: We offer in evidence "Relator's Exhibit No. 134" for whatever it is worth.

BY JUDGE MURPHY: For whatever it is worth, we will take it.

BY MR. MARGIOTTI: We offer in evidence "Realtor's Exhibit No. 134" for whatever it is worth.

BY JUDGE MURPHY: For whatever it is worth, we will take it.

BY MR. MARGIOTTI: That is one time we definitely agree.

BY JUDGE MURPHY: "Relator's Exhibit No. 134" shows:

"Pursuant to provisions of the State Council of Civil Defense Act of 1951, and pertinent orders of the Bucks County Defense Council, you are hereby appointed Public Information Officer.

"We are enclosing your identification form, No. 20057.

"8 October 1951."

BY MR. MARGIOTTI: That is all.

BY MR. VAN ARTSDALEN: That is all.

BY MR. MARGIOTTI: That is all. You are excused.

(Witness excused.)

MISS MARION R. FORD, called and sworn on behalf of the Relator, on direct and cross-examination, testified as follows:

DIRECT EXAMINATION

BY MR. MARGIOTTI:

Q. Miss Ford, where do you reside?

A. Philadelphia.

Q. How long have you lived there?

A. For the past twenty-five years.

Q. Are you related to Darcy, the Relator, in this case?

A. I am.

Q. How are you related to him?

A. I am his maternal aunt.

Q. Maternal aunt. Do you know who had charge of this case as far as contacts concerned during the trial?

A. Do I understand—have I been ——

Q. No. Do you know who did have charge?

A. Who had charge—the father of David Darcy, Joseph Darcy.

Q. Do you know where the father is now?

A. The father is presently confined to an institution. He had a mental collapse as a result of the tragedy.

Q. How long has he been in a mental institution?

A. For the past three years.

Q. What was his father doing at the time of the Feasterville killing?

A. His father served as a tipstaff in the Philadelphia courts.

Q. What was that?

A. His father served as a tipstaff in the Philadelphia courts.

Q. And did he have—do you know what judge he was working for?

A. He was in Common Pleas Court No. 6, Judges Bok, Flood—and I am sorry. I have forgotten the name of the third judge.

(456) BY JUDGE MURPHY: Judge Goldstein, Judge Leventhal ——

BY THE WITNESS: Judge Leventhal; that is correct.

BY MR. MARGIOTTI:

Q. He was tipstaff in Courtroom No. 6?

A. That is right.

Q. Then your father took charge of the case when the boy was arrested?

A. That is right; the father did.

Q. Have you taken an interest in the boy's case?

A. Yes, I have.

Q. And particularly when did your interest begin?

A. Well, my interest began from the very beginning of the tragedy naturally, but the father was in charge. I helped him in any way I could and then finally after the father's health—after he was no longer able to carry on, I more or less became the directing head.

Q. That is when the father got ill and went into the institution?

A. When he was no longer able to carry on.

Q. You carried on for the family?

A. I did.

Q. How many are there in the Darcy family?

A. Altogether there are six children, three boys and three girls.

Q. Is his mother living?

A. His mother is living.

Q. Are any of the boys here?

A. One brother is here in the courtroom. The other brother is in the United States Air Force out of the country.

Q. What about the sisters?

(457) A. There is one sister here presently. There is another sister who is here in town and isn't feeling well today. A third sister who just recently gave birth to a baby and is unable to be here.

Q. What is your occupation?

A. I am a licensed real estate broker and insurance broker.

Q. And how long have you been such?

A. I have been a licensed insurance broker for the past—oh, better than ten years, I would say. My broker's—real estate broker's license, I have been licensed for the past four years.

Q. And during the time of the—from the time of the Feasterville killing up to the present time you have been in this occupation?

A. I beg your pardon!

Q. This has been your occupation from the date of the killing at Feasterville?

A. That is right.

Q. Have you as an aunt employed counsel for Mr. Darcy?

A. I have never directly employed counsel. More or less through a friend who—well really the first time any action was taken you might say indirectly by myself was when a friend got in touch with you and through the circumstances who had no knowledge of the case ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: Yes. We have been far afield. We will not stop it. I hope we will not go that far.

BY THE WITNESS: Shall I continue it?

BY MR. MARGIOTTI:

Q. You say some friend got in touch with me?
A. That is right.
Q. You followed that up ——

BY JUDGE MURPHY: How could this possibly be material in habeas corpus?

BY MR. MARGIOTTI: Simply to show their interest. If they can bring it out, I have a right to bring it out before they bring it out.

BY THE WITNESS: The friend is here in Court.

BY JUDGE MURPHY: You are the lawyer and you have been for sometime and this Court knows it. You have been before us a year or two ago in this case and you are engaged.

BY MR. MARGIOTTI:

Q. Miss Ford, did you attend the trial, the Darcy trial?
A. I didn't attend every session. I would say I missed perhaps four or five sessions, three of which were during the selection of the jurors.
Q. That is the ones that you missed?
A. The ones that I missed.
Q. And then were you there during the taking of the testimony, with the exception of one session?
A. No, I think I missed more than one session during the taking of the testimony. I imagine more than one.

BY JUDGE MURPHY: It is now 4:32. We will recess—we will adjourn until 10:00 o'clock, tomorrow morning.

(Court adjourns for the day.)

(459) (Court resumes on Wednesday, March 17, 1954 at 10:05 with all parties, including the Relator, David Darcy, present in Court.)

BY MR. MARGIOTTI: If the Court please, the Commonwealth has caused to be prepared on scale a map of the courtroom in question—I can't give the scale because it isn't on the map—a map of the courtroom which we have agreed to introduce in evidence as "Relator's Exhibit No. 135," which shows the permanent fixtures, and we are agreeing that this is the situation as it existed at the time of the Darcy trial with the exception of the movable objects such as tables and chairs but not the chairs occupied by the jurors and not the bench.

BY JUDGE MURPHY: It will be received.

(Diagram of Courtroom marked "Relator's Exhibit No. 135.")

BY MR. MARGIOTTI: The only reason we are doing it at this time is that this witness may refer to it.

MISS MARION R. FORD, recalled

DIRECT EXAMINATION (continued)

BY MR. MARGIOTTI:

Q. Now, Miss Ford, I believe you stated that you attended the Darcy trial, is that right?

A. Yes, I did attend the Darcy trial, not every session I missed about four or possibly five sessions, three sessions of which were during the choosing of the jury.

Q. I see. Will you state whether or not you attended any night session?

A. I attended the only night session there was. That was a Friday night.

Q. Will you state whether or not you observed Judge Boyer in the (460) courtroom?

A. I did.

Q. On how many occasions?

A. Every session that I attended I saw Judge Boyer in the courtroom.

Q. And will you state when you saw him where was he?

A. He sat on the bench on all but two occasions.

Q. On what?

A. He was sitting on the bench on every session with the exception of two which I attended.

Q. And when he sat on the bench who else sat on the bench?

A. Judge Keller.

Q. Will you state whether or not at that time the trial was going on?

A. The trial was going on.

Q. Will you state whether or not you observed what, if anything, Judge Boyer did on the bench?

A. There was collaboration between the two judges, much discussion between them; and if my memory serves me correctly, I recall Judge Boyer directing questions to the attorney or some discussion with the attorney.

Q. Which attorney?

A. Mr. Achey.

Q. Now on the two occasions when he wasn't on the bench where did you see him?

A. On the two occasions when he wasn't on the bench he was sitting in the chairs reserved for the members of the bar around the semicircle.

Q. Now assuming that His Honor Judge Murphy is sitting where the judge sat —

A. Judge Boyer when he was —

(461) Q. —would it be to the Judge's right or left?

A. It would be to the Judge's right opposite the jury. The jury would be on the Judge's left and Judge Boyer would be sitting on the Judge's right.

Q. Now will you tell me what position you occupied in that courtroom?

A. I was sitting on the benches for spectators to the right of the Judge.

Q. Well, where were these benches?

A. You would enter the courthouse from the rear; as you open the door the first thing at the far end of the courtroom, the bench. There was a platform all around the entrance of the courtroom. There were—there was an amphitheater and there was—you would go downstairs. In other words, your level would go lower all the time. We would come in, turn to our left and go over and down the side aisle. We would always sit in either the first or second row. As a matter of fact, some members of the family would be in the first row all the way over and some were in the second row. Myself I sat in the second row.

Q. I want you to look at "Relator's Exhibit No. 135." I want you to state whether or not you could designate for the benefit of the Court here the place that you occupied. First, do you understand the map?

A. Yes, I do. Here's the judges' bench, the jury, prosecution table, defense table. There should be another table in here. This I presume is the reporters' table.

Q. You speak for yourself.

A. All right. We sat either the first or second rows; the benches here, the first and second row. These are the chairs reserved for the members of the press. On the particular occasions of (462) which I spoke Judge Boyer was seated about here, this chair here.

Q. Now did you at any time observe ——

BY JUDGE MURPHY: For the record "about here" doesn't mean anything to the Appellate Court

BY MR. MARGIOTTI: I am going to have her mark the exact place after I ask her the next question or two.

Q. Did you at any time observe anything unusual with reference to Judge Boyer?

A. Yes, I did.

Q. Now will you turn to the Court and tell the Court what you observed?

A. It was the last session of the trial ——

Q. Toward the Reporter ——

A. It was the last session of the trial. Judge Keller was making his charge to the jury. Judge Boyer was not on the bench at the time but in this chair that I pointed out to you. Sitting next to him and to Judge Boyer's right was Mr. Biester, the District Attorney. Mr. Biester at this particular time was sitting in a very relaxed position, his legs

were outstretched, his elbows were resting on the arms of the chair. I am very intently watching and listening to Judge Keller who is making his charge to the jury. Judge Keller is about to conclude, he stops his charge and he turns and he looks in the direction of the prosecution table and the defense table and he said, "Have I forgotten anything? Have I overlooked anything?" Mr. Achey, who was sitting at the defense table at the time—(463) now I am putting this in my own words; I am not quoting verbatim—Mr. Achey answered—said, "No, Your Honor, so far as the defense is concerned." There was no answer from the prosecution. Mr. Biester at this particular time was sitting away from the prosecution table and was over at the opposite end of the courtroom. There was absolutely no answer at all. Judge Keller proceeded to make his closing remarks. He is finished, so far as the charge is concerned. He is making his closing remarks to the jury when suddenly my attention is attracted by seeing Mr. Biester sit upright in his chair, put his hand out and accept the note, a piece of note paper, hold it up, read it, jump to his feet and make his steps all the way over to the bench where Judge Keller was making his closing remarks to the jury. He stood there until he attracted Judge's Keller's attention. After a while he succeeded in attracting Judge Keller's attention. And he—again I am not quoting verbatim—he said, "Your Honor," Mr. Biester addressing Judge Keller—"Your Honor, I believe you inadvertently did thus and so." Now it was some legal point and I would hesitate to repeat what the point was, but the words he said created the impression. "You said something should be second degree when you should have said first degree," something more or less along those lines. Judge Keller was quite annoyed. He said—I am not quoting verbatim—"I think I covered that point very clearly and that I didn't make any such error, but in

case I did, then for the record I should like to say thus and so" There was quite some discussion at the time. The Judge made this correction that Mr. Biester spoke of, and that was all there was to it. That was the end.

(464) Q. Now on "Exhibit No. 135" would you please take this pen with green ink and write the word "Boyer" where he was seated when you saw the note passed?

BY JUDGE MURPHY: If you are writing on the exhibit you will please write "Judge Boyer."

BY THE WITNESS: Should I refer to Mr. Biester?

BY MR. MARGIOTTI:

Q. You do what the Court tells you.

(Witness marks the exhibit.)

BY MR. VAN ARTSDALEN: I object to this exhibit being marked by the witness simply because the witnesses will have indicated a seat.

BY JUDGE MURPHY: What it is doing—it is putting her mark on the exhibit; it is spelling out the mark to other witnesses.

Do you object?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: Do you have another copy?

BY MR. MARGIOTTI: She has written in there "Judge Boyer."

BY MR. VAN ARTSDALEN: We will object to any further markings.

BY JUDGE MURPHY: Well, you can't continue. Do you have other copies of it?

BY MR. VAN ARTSDALEN: This is the only one we have here. There may be another (465) one brought up here this afternoon.

BY JUDGE MURPHY: Here's a case of a witness going on the stand and then taking a Commonwealth's exhibit which has been offered by the Relator and then marking it and it will presumably be followed by other witnesses who will have the markings immediately before them. It is an indirect, ingenious way of leading the subsequent witness and should not occur. However, Judge Boyer's name is on there, one of the chairs. The witness can designate for the record—point out to the Court and counsel if counsel for the Relator feels it is relevant and pertinent and helpful—point out the place and we will see that it is marked later on in the trial.

BY MR. MARGIOTTI: May she use numbers in place of names?

BY JUDGE MURPHY: No, you will not mark that any further. You will describe for the record and we will see it is protected so far as the identification is concerned.

BY MR. MARGIOTTI:

Q. You have described the location of the chair, I believe, Judge Boyer was occupying?

A. Yes sir, that is right.

Q. Where was the chair that Mr. Biester, the District Attorney, was occupying?

A. Immediately next to him.

Q. Mr. Biester was occupying the chair in front of the second section coming from the left ——

BY JUDGE MURPHY: It is quite obvious here that Judge Boyer occupied the (466) first chair in the second section from the left.

BY MR. MARGIOTTI:

Q. Where were you seated?

(Witness indicates.)

BY JUDGE MURPHY: The witness was sitting a bit to the right of the center of the first row of the second section to the left.

BY MR. MARGIOTTI: And approximately behind the third chair.

BY JUDGE MURPHY: She is not pointing behind. If she means ——

BY THE WITNESS:

A. I believe here.

BY JUDGE MURPHY: Behind the fourth or fifth chair, second row—right?

BY THE WITNESS: Yes sir.

BY MR. MARGIOTTI:

Q. Which row were you in?

A. The second row.

Q. And when Mr. Biester walked up to the bench where did he walk to?

(Witness indicates.)

BY JUDGE MURPHY: The witness designates that Mr. Biester walked over past and around the jury and up in the center of the courtroom to the bench where the Judge was sitting.

BY MR. MARGIOTTI: That is not the jury; that is the reporters' table.

BY JUDGE MURPHY: He walked over past the reporters' table and up to the (467) bench where the Judge was sitting in the center of the courtroom.

BY MR. MARGIOTTI:

Q. And did—will you state whether or not ——

BY JUDGE MURPHY: Are you through marking?

BY MR. MARGIOTTI: As far as I can go under the ruling of the Court ——

BY JUDGE MURPHY: The Court will not restrict you in spelling out your case. Don't mark the exhibit. That is what I say.

BY MR. MARGIOTTI: You asked me—"Are you through

marking?" As far as I can go under the ruling of the Court; I am.

Q. At the time that Mr. Biester spoke to the Judge where was he with reference to this front bench?

A. The center.

Q. In the center. And if we were—will you state whether or not the bench occupied by the Court and the bench in front of the Court was somewhat similar to the bench in this courtroom?

A. A somewhat similar arrangement.

Q. Then Mr. Biester would stand where?

A. In the center.

Q. In the outside center?

A. That is right.

Q. Now then, do you know what Mr. Biester did with the note?

A. That I don't. You see, all the time he was standing at the bench his back was toward me. That I couldn't answer.

Q. And where did the note come from—from Boyer?

A. The note was handed to Mr. Biester by Judge Boyer.

(468) Q. Now you said you saw Judge Boyer off the bench on another occasion I believe you stated?

A. Yes, I did.

Q. Will you state when that was?

A. That was at the only night session—Friday night.

Q. And what was he doing then?

A. He was sitting in the very same seat opposite the jury and well—just apparently listening to the trial the same as we were doing.

Q. Do you know how long he was in the courtroom at the time the note was passed that you talked about—about how long?

A. Well, if my memory serves me correctly, Judge Keller

started his charge to the jury—I can recall you read docket entries the other day; I think you said at 1:30.

Q. I want to know about how long?

A. About one hour.

Q. About one hour. Will you state how long he was there the second time you spoke of?

A. Wait a minute! You are saying the first day ——

Q. When the note was passed, how long was he there?

A. One hour.

Q. On the second occasion how long was he there?

A. The note was passed ——

Q. I am not talking about when the note was passed. I am talking about the second time you saw him in the courtroom ——

BY JUDGE MURPHY: Friday night.

BY MR. MARGIOTTI:

Q. Friday night.

A. For the whole session, as far as I know. I remember seeing him for most of the session anyway.

Q. Do you know how long the session was?

(469) A. Oh, two to two and one-half hours.

Q. Now do you recall whether at that time when the Judge was seated in the courtroom how he was attired on the two occasions?

A. In street clothes.

Q. And when he sat on the bench on the occasions that you have mentioned do you recall how he was attired?

A. Well, I believe street clothes. I don't recall their wearing robes.

Q. On that second occasion do you know who sat with him or near him?

A. The Friday night session ——

Q. Yes.

A. Mr. Biester.

Q. And when he sat on the bench do you know how long he sat on the bench during the Darcy trial?

A. For various lengths. His stays on the bench would ——

Q. Vary from what to what?

A. Well, I think there might have been times he stayed for a full session; other times a very short stay; and I believe on more than one occasion he would make more than one appearance at a particular session.

Q. And when he made his appearance on the bench where did he come from —how did he enter the courtroom?

A. The door to the Judge's right at the corner. I couldn't see very well from my position. I could just see him make an entry, that's all.

BY MR. MARGIOTTI: That is all.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Miss Ford, I take it that you are not married, is that correct?

A. That is correct, Mr. Artsdalen.

Q. What is your address in Philadelphia?

A. My home address ——

Q. Yes sir.

A. 1810 Rittenhouse Street.

Q. Where is your business office?

A. My business office is in the Robinson Building, 15th and Chestnut, 42 South 15th Street.

Q. I believe you stated you were an insurance and real estate broker?

A. That is correct.

Q. Are you associated with anyone else in that business?

A. No.

Q. You run your business yourself, is that correct?

A. That is correct.

Q. And does that agency have any particular name?

A. M. R. Ford.

Q. Now, as I understand it, you had nothing to do with the employment of the original counsel for David Darcy, is that correct?

Q. Do you know who did employ counsel for David Darcy?

A. His father.

Q. That counsel was Thomas McBride?

A. Webster Achey.

Q. Do you know whether Mr. McBride was employed?

A. Mr. McBride was employed to help prepare the appeal in the Pennsylvania Supreme Court.

Q. You mean he was not employed prior to that?

(471) A. No. He might have been consulted but not employed.

Q. Do you know who selected Mr. Achey?

A. Mr. Achey was selected upon the recommendation of two co-workers of Mr. Darcy.

Q. Who were they, please?

A. Clarence Water and a man they call "Gus" Thompson; I don't know whether it is August or what his given name would be, but they call him "Gus," who, by the way, were personal friends of Mr. Achey.

Q. Mr. Darcy's father was a tipstaff in the Court of Common Pleas No. 6 in Philadelphia; is that correct?

A. Yes sir.

Q. That is Judge Bok's court?

A. That is right.

Q. Is he the President Judge?

A. Judge Bok is not President Judge.

Q. So that at the time of the trial you were in no way directly interested in the case, is that correct, except as a relative?

A. Naturally, I was interested.

Q. As a relative?

A. As a relative; and I did try to help them out financially.

Q. You contributed financially originally?

A. That is right, yes.

Q. Now you stated, I believe, that Mr. Margiotti was originally employed through a mutual friend—or through a friend; is that right?

A. You see, I had been a friend of Mr. Margiotti and his family for a number of years and at one particular time a friend of ours—when things were very dark a friend of mine phoned Mr. Margiotti's home quite late in the evening and told him about (472) it. That was the first time.

Q. Would you care to tell us who that friend is, Miss Ford?

A. Margaret Gordon.

Q. Where does she live, please?

A. Philadelphia.

Q. Do you know her address?

A. I believe it is 5025 Frankfort Avenue.

Q. What is her employment?

A. Real estate.

Q. When did you come to Doylestown, Miss Ford, for this trial?

A. My first appearance ——

Q. Yes m'am.

A. Tuesday afternoon. That would be June 8, I believe.

Q. And why did you come to town at that particular time?

A. For the trial.

Q. Had you been informed the jury had been selected?

A. Well, the jury hadn't been selected in its entirety at that time. There were still two alternates to be selected.

Q. Did you see any of the jury selected?

A. The selection of alternates.

Q. When did that take place?

A. Tuesday afternoon.

Q. From what time until what time?

A. I would say that maybe it consumed an hour and one-half.

Q. Maybe an hour and one-half?

A. Yes.

Q. What time did you arrive at the courtroom on Tuesday afternoon?

A. Right after the morning session adjourned.

Q. What time was it you came to the courtroom?

A. Around noon.

Q. Right after the sesison adjourned?

A. Yes.

(473) Q. All right. Did you come back then after the adjournment?

A. I stayed around there because I was waiting for some of the members ——

Q. In the courtroom?

A. Not in the courtroom.

Q. During the adjournment or noon recess?

A. That is right.

Q. What time did the court continue with the case then in the afternoon?

A. What time ——

Q. Reconvene.

A. I would say about 1:30.

Q. Around ——

A. Around 1:30.

Q. In other words, it took from then to an hour and one-half before the jury was selected, is that correct?

A. I believe so.

Q. What happened immediately after the jury was selected?

A. Then it was agreed that they would visit the scene—visit the Feasterville Inn.

Q. Now would it refresh your recollection if I said to you that the record indicates that the jury went to the scene at 2:04 P. M. on Tuesday afternoon?

A. 2:04 ——

Q. Yes sir. Does that refresh your recollection?

A. Does it say what time they reconvened in the afternoon ——

Q. I am asking you whether that refreshes your recollection as to how long it was in the afternoon before the jury was selected?

A. I though about one hour elapsed.

(474) Q. Well, would you say that it was longer than from 1:30 until 2:04 P. M.?

A. I thought it was.

Q. But you are not sure?

A. I am not sure at that point.

Q. That is because this all happened quite a few years ago; isn't that right?

A. No, not that it all happened quite a few years ago, but the fact time when you are tense you have no idea just how quickly the time passes.

Q. When you are tense time goes more slowly or rapidly?

A. Sometimes depending on the circumstances.

Q. All right. Did you stay there in the courthouse until the jury came back from the jury view?

A. No sir.

Q. You did not?

Q. What time did you leave the courthouse that afternoon?

A. Well, I would say shortly after court adjourned.

Q. Well now, you say you left, you weren't there when the jury returned; is that correct?

A. That is correct.

Q. Now, would it refresh your recollection if I told you the jury returned at 3:54 and that the court adjourned at 3:55 until Wednesday, June 9?

A. I was not there when they returned.

Q. You weren't there when they adjourned, were you?

A. No.

Q. So that you are incorrect about that?

A. I was incorrect about that. That is adjourned. When I said "adjourned," I meant adjourned to visit the Feasterville Inn.

(475) Q. Now yesterday you said you missed three sessions in the selection of the jury. There were only three sessions in selecting the jury, isn't that correct?

A. Well, I thought there was Monday morning, Monday afternoon, Tuesday morning and Tuesday afternoon.

Q. Now when you came in on Tuesday afternoon was Judge Boyer on the bench?

A. I believe he was.

Q. You believe he was. If the minutes of the Court of Quarter Sessions which have been introduced into evidence indicate only Judge Keller was on the bench, would that refresh your recollection?

BY MR. MARGIOTTI: We object. It isn't based on facts.

BY JUDGE MURPHY: The objection is overruled. We are trying to find out what the fact is.

BY MR. MARGIOTTI: I know, but when the District Attorney quotes a record he should quote it correctly.

BY JUDGE MURPHY: Let's see the Court of Quarter Sessions minutes.

A minute right there, the docket entry; the Relator's exhibit. According to this exhibit, which is "Relator's Exhibit No. 4," the docket entries read as follows:

"1948 June 8—Court Called at 9:30 O'clock A. M. Hon. Hiram H. Keller, President Judge presiding.

"Eo Die—Court took a recess at 12:10 O'clock P. M. until 1:30 O'clock P. M. * * *".

(476) "Eo Die—Court called at 1:30 O'clock P. M. The Prisoner, David Darcy being present in Open Court and represented by his Counsel, Webster S. Achey, Esq., and William Power, Esq., The Court directs the trial to proceed * * *".

So that there is nothing in the docket as of that moment as to who was on the bench.

BY MR. MARGIOTTI: That is right. That is the reason I was making my objection.

BY JUDGE MURPHY: That is on that phase of it.

BY MR. MARGIOTTI: That is correct.

BY JUDGE MURPHY: This sheet, which is part of "Relator's Exhibit No. 116," reads as follows:

"1948 June 8—Court called 9:30 A. M. Hon. Hiram H. Keller, P. J. * * *".

The next sheet shows:

"Eo Die—Court recess 12:10 to 1:30 P. M. Defendant remanded into the custody of the Sheriff & returned to the Bucks Co. Prison * * *"

The next sheet shows:

"Eo Die: Call 1:30 P. M.

Defendant, David Darcy present in Open Court with his Counsel. The Court directs the trial to proceed, & that a Jury be sworn * * *"

The transcript of testimony at Page 261 shows:

"Recess taken from 12:05 p. m. to 1:30 p. m.

(477) "Jury called for attendance."

All right, that is the situation. We think you should reframe your question.

BY MR. VAN ARTSDALEN: Very well.

Q. Your recollection is then that Judge Boyer and Judge Kelley both sat on the bench on Tuesday afternoon when court convened?

A. When court convened; that is my recollection.

Q. Do you remember whether Mr. Achey at any time made any objection to Judge Boyer sitting on the bench?

A. I believe there was an objection. Now it may have been a sidebar conference. It may have been some notes I read.

Q. In other words, you are basing this statement on notes of testimony or something you read since the trial?

A. That may have been on that.

Q. You have no personal recollection of Mr. Achey ever raising any objection to Judge Boyer being there, do you?

A. It was my understanding that he had. It may have been from the notes that I have since read. I don't want to be too specific on that.

BY JUDGE WATSON: Did you hear counsel, Mr. Achey, make any objections in open Court?

BY THE WITNESS: I don't believe I did.

BY MR. VAN ARTSDALEN:

Q. Now how many sessions then was it you attended from Tuesday noon on?

A. From Tuesday noon on.

Q. Yes m'am.

(478) A. Of course, as I said, Tuesday afternoon session ——

Q. Yes.

A. Wednesday morning and Thursday morning I missed.

Q. You were not there Wednesday morning or Thursday morning?

A. No, I had to go to the office first. Friday morning I arrived late.

Q. So that you were there Tuesday morning, Wednesday afternoon ——

A. No, Tuesday afternoon.

Q. Tuesday afternoon, I am sorry.

A. That is all right.

Q. Wednesday afternoon ——

A. That is correct.

Q. Thursday afternoon ——

A. That is correct.

Q. What about Friday?

A. Part of Friday morning, all of Friday afternoon, all of Friday evening, Saturday morning, Monday morning and Monday afternoon.

Q. All right. Now during any of the occasions that you were in Court was the courtroom cleared at any time by order of the Court?

A. Not—I don't recall any such order.

Q. You were not asked to leave at any time, were you?

A. No sir.

Q. Were there any disturbances in the courtroom?

A. I particularly recall Friday evening it was so very crowded and there was an awful lot of excitement going on.

Q. Were there any disturbances in the courtroom Friday evening?

A. Not other than excitement and noise; a lot of excitement, a lot of noise.

Q. What do you mean by "noise"; just people moving around?

(479) A. Going in the back, talking at the door entrance, they had discussions there. A very noisy and excited session, I would say.

Q. Well, was there any objection raised to any of it by Mr. Achey or any of the attorneys there?

A. I don't recall that.

Q. Do you recall whether the tipstaff or the Court clerk or anyone in the Court, had to call for order at any time during that session?

A. I don't recall it.

Q. Did they during any of the sessions have to call for order?

A. At the sessions at which I was present —

Q. Yes.

A. I don't recall any.

Q. Did the Court at any time ask for order at any time you were attending the trial?

A. No sir—it seems to me that there was some—the Judge asked at one time something about—there had been some rooms in the courthouse newly decorated and due to the crowds going in and out the walls had been damaged one way or another, and he asked them to please refrain from

doing any damage to the courtroom walls. I remember he asked, "Please be orderly."

Q. Did he call for order during the course of the trial because of any disturbances?

A. No, I don't recall any.

Q. Specifically Friday night did he call for order?

A. I don't recall his calling for order. I just recall the impression the session had on me.

Q. How did you know Judge Boyer?

A. Because he was on the bench—because we knew there were two (480) judges in the Court there, Judge Keller and Judge Boyer, and we knew that Judge Keller was the presiding judge. We knew that Judge Boyer had presided at the previous week's trial, the fact that ——

Q. How did you know that—only what people told you?

A. Yes, and what we read in the paper.

Q. How did you know then when you came in Tuesday afternoon which judge was presiding at the trial?

A. Which judge was presiding at the trial ——

A. Yes.

A. Of course, that came with the time you spent in the courtroom.

Q. In other words, there was no question in your mind even though there was two judges on the bench Tuesday afternoon, Judge Keller was trying the case?

A. The thing was, Judge Boyer would make so many appearances of such varied stays ——

Q. Please try to answer my question.

A. He never left the bench, Judge Keller. He never left the bench during a session, Judge Keller.

Q. Just where was the judges sitting on the bench, please?

A. My recollection is two chairs there.

Q. Your recollection is two chairs there?

A. Two high-back chairs.

Q. And in which chair did Judge Keller sit?

A. Judge Keller sat on the left.

Q. Judge Keller sat on the left as he was facing; is that correct?

A. That is right.

Q. Now you have testified, I believe, that Judge Boyer came, walked off the bench on various occasions. Now, was he there all the time Tuesday afternoon that you were in Court; was he on the (481) bench?

A. To the best of my recollection.

Q. Did you see him confer on that occasion with Judge Keller at all?

A. I believe—I don't recall at that time.

Q. You don't recall?

A. Not during the selection of the jurors.

Q. As a matter of fact, you are not sure he was on the bench Tuesday afternoon, are you?

A. To the best of my recollection, he was.

Q. But you are not sure of it?

A. No, I wouldn't say I am sure of it.

Q. You say you think he stayed there the full time. What about, you weren't there Wednesday morning?

A. No.

Q. What time Wednesday afternoon—what time did the Court start?

A. 1:30, I believe.

Q. And did both judges come in on that occasion?

A. To the best of my recollection.

Q. But you are not sure?

A. I am not sure.

Q. Then you wouldn't know how long Judge Boyer stayed on the bench Wednesday afternoon?

A. No; his stays varied. That is why it is so difficult.

Q. His stays varied but you don't know how long he was on the bench Wednesday afternoon or if he was on?

A. I don't believe there was a session I attended he did not make an appearance in the courtroom. He was on the bench, to the best of my recollection, every session with the exception of the two I mentioned, Friday night's session and the afternoon session (482) of the last day of the trial.

BY JUDGE MURPHY: Do you press your question?

BY MR. VAN ARTSDALEN:

Q. You are not sure, however, Wednesday afternoon whether Judge Boyer was even on the bench; isn't that correct?

A. I am sure he was on the bench at sometime.

Q. Sometime ——

A. During the afternoon. Whether that was at the commencement of the afternoon session or later, I can not be specific.

Q. Incidentally, Miss Ford, did you make any notes as the case progressed as to when the judges were in there?

A. No, I did not.

Q. So that you are relying only on your recollection, is that correct?

A. That is correct.

Q. And since the case have you examined the notes of testimony and other records in this matter?

A. Yes, I have.

Q. And have you consulted with Mr. Margiotti and other persons about this matter?

A. Mr. Margiotti and Mr. Pannell—I discussed it with them.

Q. Isn't it a fact some of the statements you are now making are based partly on your discussions and your examination of the record subsequent to the trial rather than on your own personal recollection?

A. It is not. It is based on my own recollection.

Q. And that was how long ago that this trial was held?

A. The trial started on June 7, 1948 and finished the following Monday, June 14.

Q. Who attended the trial with you, Miss Ford?

(483) A. The Darcy girls; the three Darcy girls.

Q. Every session you were there they attended with you?

A. I don't believe they were present at the Tuesday afternoon session. I was there but I don't believe they were there.

Q. You had the same seat throughout at the trial?

A. Yes sir.

Q. You had no difficulty at any time obtaining a seat, did you?

A. Those seats were always more or less available.

Q. They were available. In other words, the tipstaff saved a special place for you?

A. No.

Q. Why were they available? How do you mean?

A. It was more or less accepted that the defendant's family and friends were seated in these particular seats and we always more or less could get those seats.

Q. There was plenty of room at all times?

A. No, there was not.

Q. There was not?

A. No.

Q. Now let's get down to that. How many people do you think were in the courtroom Tuesday afternoon when you came in?

A. Well, I don't think there was such a great crowd in the courtroom Tuesday afternoon when I came in.

Q. How many people do you think there were?

A. Well, perhaps 150—200 maybe.

Q. And how about Wednesday afternoon's session?

A. I would say more.

Q. How many more?

A. 200.

Q. Well now, you said that Tuesday afternoon you thought ——

A. About 150 to 200.

484 Q. About 150 to 200?

A. Yes.

Q. Wednesday afternoon about 200?

A. 200—225; I mean a slight increase.

Q. How about Thursday morning?

A. Thursday morning, 300. In other words, an increase at each session.

Q. An increase at each session. You are quite positive of that?

A. That is my recollection.

Q. How about Thursday afternoon?

A. Well, an increase—I would say 325; in through there.

Q. How about Friday morning?

A. Friday morning, 350; in through there.

Q. In other words it went up just about ——

A. An increase at each session that I attended.

Q. —of about twenty-five people?

A. I am saying that. It is awfully hard to give figures on something like this.

Q. You are giving the figures, Madam.

A. Yes sir.

Q. How about Friday afternoon?

A. Friday afternoon I would say a much larger increase.

Q. How many people?

A. Say 400-425.

Q. That is a much larger increase?

A. Yes sir.

Q. How about Friday evening?

A. Jammed to capacity, and people standing.

Q. How many people do you think were in the courtroom Friday evening?

(485) A. Well, let me see here—is it all right to ask you how many people the courtroom would accommodate?

BY JUDGE MURPHY: No, answer the question.

BY THE WITNESS: Over 500.

BY MR. VAN ARTSDALEN:

Q. How about Saturday morning?

BY MR. MARGIOTTI: Friday evening —

BY THE WITNESS: Friday evening people were standing.

BY JUDGE MURPHY: Jammed to capacity, people standing, over 500.

BY THE WITNESS: Also all the seats they had here practically every seat taken, that were reserved for the members of the bar.

BY MR. VAN ARTSDALEN:

Q. How about Saturday morning?

A. Another crowded session, a very crowded session.

Q. How many people do you think were in there?

A. Well, a capacity crowd.

Q. How many people do you think were in there?

A. I would say 500.

Q. How about Monday afternoon?

A. The same thing, a capacity crowd, as many as it would accommodate and people standing around.

Q. How many do you think the courtroom would hold?

A. Five to six hundred.

Q. And I noticed you were looking at the exhibit there at that time. Was that that you were trying to calculate the number (486) of seats?

A. I was trying to recall.

Q. What—do you remember the evidence that was produced at the Friday evening session—the general nature of the evidence?

A. Fairly well.

Q. What was it, please?

A. Well, to the best of my recollection, the ballistics expert spent considerable time giving testimony.

Q. You have read the notes of testimony to refresh your recollection?

A. I have not read anything with reference to that.

Q. You have not?

A. No. That is from memory.

Q. I believe you testified on Friday evening Judge Boyer was sitting with Mr. Biester?

A. That is right.

Q. Where was Mr. Biester sitting?

A. Mr. Biester was sitting in the chairs reserved for members of the bar.

Q. Who was trying the case?

A. Mr. Curtin.

Q. Mr. Curtin was?

A. Yes.

Q. He was presenting the evidence that evening?

A. Mr. Curtin had more or less taken over Friday evening.

Q. And he was doing the questioning?

A. Mr. Biester would leave the prosecution table and come over and sit in these chairs reserved for members of the—

Q. Did Mr. Curtin ask any questions?

A. Ask any questions ——

(487) Q. Yes m'am.

A. I believe so.

Q. You believe that he did?

A. I believe that he did.

Q. If I would say to you the record in which the—indicates Mr. Biester asked questions and there were no questions asked by Mr. Curtin, would you change your testimony?

A. Well; you mean at this particular Friday night session ——

Q. Yes m'am.

A. Mr. Biester I didn't say he didn't ask questions. I said he would leave ——

BY JUDGE MURPHY: As we understand it—as we recall it—as the Court recalls it, you said that Mr. Biester sat with Judge Boyer throughout the entire proceeding on Friday night over where the lawyers were. That is what you said before.

BY THE WITNESS: I am sorry; I didn't mean it that way.

BY JUDGE MURPHY: We will take a ten-minute recess.

(Recess.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

MISS MARION FORD, recalled.

CROSS-EXAMINATION (Continued).

BY JUDGE MURPHY: Read Mr. Van Artsdalen's question, Mr. Reporter.

(Question of Mr. Van Artsdalen read by the Reporter as follows: "Q. If I would say to you the record in which the—indicates Mr. Biester asked questions and there were no questions asked by Mr. Curtin, would you change your (488) testimony?")

BY MR. VAN ARTSDALEN:

Q. Now on that Friday evening.

BY MR. MARGIOTTI: He is assuming the record shows one thing when it does not.

BY JUDGE MURPHY: Your witness has said, as we understand, Mr. Biester and Judge Boyer sat together on the sidelines throughout the session. The question is: If I were to show you the transcript and the transcript shows Mr. Curtin did not ask a question but Mr. Biester conducted the whole examination, would that change your testimony?

BY MR. MARGIOTTI: The record does not show that Mr. Biester did at all.

BY JUDGE MURPHY: We refer you to Page 769.

BY MR. MARGIOTTI: I refer Your Honor to another page. I refer Your Honor to Page 814.

BY JUDGE MURPHY: Starting at 769 Mr. Biester is asking the questions.

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: That takes to 771.

"MR. BIESTER: That is all I am going to ask him now.

"MR ACHEY: I will not question him at this point."

The next witness; "By Mr. Biester," then the questioning (489) 772, 773 by Mr. Biester again; 774 "By Mr. Biester," 775 the questioning goes on; 776 "By Mr. Biester," the questioning by Mr. Biester; 777 the questioning goes on, 778, 779, 780, 781; at this time Mr. Biester makes a statement again; Mr. Biester questions at 782; 783; questioning goes on 784; "Mr. Biester" 785; questioning goes on, "Mr. Biester," 786, 787; questioning goes on 788, 789, 790, 791, 792, 793, 794; Mr. Achey's cross-examination 795, 796, 797, 798, 799 Mr. Biester addressed the Court offering in evidence various cartridges; 800 "Mr. Biester" again; 801 "Mr. Biester" again on many occasions; 802 Mr. Biester examining Mr. John J. Hanlon; 803 questioning going on; 804 "Mr. Biester," 805, 806, 807; 808 "Mr. Biester"; 809 "Mr. Biester: If the Court pleases * * *," again he makes a statement; then cross-examination by Mr. Achey part of 809, 810; 811 "Mr. Biester" again twice, 812, 813 and so on. All right.

BY MR. MARGIOTTI: What I am calling your attention to is on page—beginning with the bottom of Page 813.

BY MR. VAN ARTSDALEN: I am coming to that as part of my cross-examination.

BY JUDGE MURPHY: It is your witness.

BY MR. MARGIOTTI: I make the objection. There are a number of pages that Mr. Curtin read to the jury a statement that was offered in evidence and it was marked ——

BY MR. VAN ARTSDALEN: Your Honor, I intend ——

(490) BY MR. MARGIOTTI: —"CX-69"; which would give him an opportunity at least during the reading of that statement to sit where he pleased.

BY JUDGE MURPHY: Are you though?

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: Proceed with your questioning.

BY MR. VAN ARTSDALEN:

Q. Miss Ford, do you remember Mr. Curtin asking any questions during that Friday night session?

A. Asking any questions ——

Q. Yes m'am.

A. I believe I recall Mr. Curtin reading the —what was it —statements of the boys.

Q. You knew Mr. Margiotti just said that—didn't he?

BY MR. MARGIOTTI: I beg your pardon! I didn't say that at all.

BY JUDGE MURPHY: The record is the best evidence.

BY MR. VAN ARTSDALEN:

Q. Did Mr. Curtin ask any questions that you recall?

A. I have only a recollection of his reading the statements and at that time Mr. Biester was not sitting at the prosecution table.

Q. Madam, is your answer no to that last question?

A. The answer is no; I am sorry.

Q. Now, didn't you state earlier that Mr. Curtin was conducting the examination that night?

(491) A. Sir, I believe I didn't make myself clear. What I meant was that when Mr. Biester would be away from the prosecution table Mr. Curtin would more or less take over.

Q. What do you mean by "more or less take over"?

A. I meant that if there was—for instance, when he was reading the statements of the boys Mr. Biester left the table and went over and he was sitting next to Judge Boyer during the reading of the statements—during the judge's charge to the jury.

Q. No; the judge's charge to the jury wasn't Friday evening, was it?

A. No sir.

Q. And when did Judge Boyer come into the courtroom that evening?

A. Friday evening's session ——

Q. Yes m'am.

A. To the best of my recollection, he was there when Court convened that evening.

Q. And how long was that evening session, please?

A. Oh, perhaps two hours or a little more.

Q. And for how long a period of time was Mr. Biester sitting with Judge Boyer?

A. Well, I would say at least one-half hour.

Q. At least one-half hour. What part of the evening was that, please?

A. If my memory serves me correctly, it was toward the end of the session.

Q. Toward the end of the session?

A. It was when Mr. Curtin was reading the statements.

Q. In other words, you are now saying it was while Mr. Curtin was reading the statements and only during that period?

A. That is what I recall particularly.

(492) Q. After the statement was read did Mr. Biester ask any further questions?

A. After the statement was read—pardon me! Would you please repeat ——

Q. I withdraw that question. After the statement was read by Mr. Curtin did Mr. Biester examine other witnesses?

A. I believe so.

Q. How many?

A. I couldn't recall.

Q. I am talking about that evening session.

A. I understand. I don't recall.

Q. Did Mr. Biester ask other questions after the statement was read that evening?

A. After the statement was read ——

Q. Yes m'am.

A. I thought so. I don't recall exactly.

Q. Well, if I would tell you that the record indicates that after the statement was read by Mr. Curtin the Court took an adjournment until the following morning; would that refresh your recollection?

A. Well, I said before I didn't recall exactly.

Q. But you are quite sure now as to the time that Mr. Biester went over to talk to Judge Boyer?

A. Was sitting next to him.

Q. The courtroom was crowded that night?

A. Yes sir.

Q. Were the chairs around the semicircle in front of the railing—were they all filled?

A. Practically every chair.

Q. Practically every chair. Were some of them vacant?

(493) A. Well, the thing that I recall—there might have been a chair or two vacant at the entrance.

Q. Well, where was Judge Boyer seated?

A. Judge Boyer was sitting immediately opposite the jurors to Judge Keller's right.

Q. Let's see if we can't identify it a little better as to what chair it was on the plan. Judge Boyer you say was sitting at a place which you have marked on this exhibit as Judge Boyer's chair; is that correct?

A. Yes sir.

Q. Now then, who was seated to Judge Boyer's left during that whole—to Judge Boyer's right?

A. Mr. Biester.

Q. You mean the chair was empty until Mr. Biester came over there?

A. There were different people came and stopped and talked to Judge Boyer.

Q. Do you know who any of them were?

A. I personally don't know who any of them were, but I do know someone pointed out someone and said, "That is Senator Watson."

Q. You don't know anybody that was there?

A. I don't know. He was pointed out to me as Senator Watson.

Q. Am I correct—it just happens the chair was vacant at the time Mr. Biester went over there?

A. I suppose so.

Q. Were there any other vacant chairs in front of the courtroom in front of that railing?

A. Toward the entrance there were some vacant chairs there.

Q. Toward the entrance there were some vacant chairs there?

A. Yes sir.

(494) Q. Yet you say there were people standing in the courtroom?

A. They are reserved for the members of the bar. People were standing back here.

Q. People were standing back here?

A. Yes.

Q. Do you know whether or not ——

BY MR. MARGIOTTI: "Back here." May we have the record indicate where she pointed to?

BY JUDGE MURPHY: You may do it on redirect. Where do you mean by that?

BY THE WITNESS: I mean as you enter there is a platform level that goes to both sides depending on which side of the courtroom you are going to sit in. There were people standing at the top level of the courtroom.

BY MR. VAN ARTSDALEN:

Q. About how many people?

A. Well, I would say in the section where I was seated, oh, perhaps one-half dozen.

Q. How many were standing in the courtroom altogether?

A. I couldn't answer that.

Q. Can't you give us any approximate idea?

A. No sir, I couldn't.

Q. Why not?

A. Just in my particular area.

Q. So that you only observed one-half dozen people standing?

A. In my area.

(495) Q. What do you mean by "my area"?

A. Well, as I would look back here I could see the people there.

Q. You mean you didn't look around the courtroom?

A. Of course, as you looked—looked in the courtroom at the other side all you saw was a mass of people. It would be difficult to pick out people standing or sitting.

Q. You mean you didn't look around the courtroom?

A. Yes sir, I did. I mean I couldn't very well tell in the other end of the room if there were sitting or standing.

Q. How many times did Mr. Biester come over and talk to Judge Boyer that evening?

A. I just recall him on this one occasion.

Q. Now then, you were how close at that time to where Judge Boyer was seated?

A. How close? I would say a distance of approximately eight feet.

Q. Did you hear him say anything at that time?

A. No sir.

Q. Judge Boyer didn't take any part in the proceedings at that time, did he?

A. Not that evening.

Q. How far was he sitting from where the nearest juror was seated?

A. Immediately across the room.

Q. How far?

A. The distance of the courtroom; I would estimate—

Q. Give us an approximate idea.

A. An approximate idea—oh, sixty feet.

Q. How far?

A. Sixty feet.

Q. Sixty feet. Now then, between Judge Boyer and the jury there (496) were chairs and tables, were there not?

A. Yes sir.

Q. And then there were people seated in those chairs, is that not correct?

A. Between Judge Boyer and the jury there was the prosecution table.

Q. Yes. And there was also, was there not, a series of chairs grouped in there for members of the press and for members of the bar?

A. Yes sir.

Q. And there was another table intervening?

A. That is right.

Q. Were there people seated around that table? I am not talking about the defense table. There was another table intervening?

A. Yes, there was. I have no recollection of people sitting at the second table.

Q. You mean there was no one sitting there?

A. No. That is where the evidence was being placed. I have a recollection of people going there and putting evidence there, but I have no recollection of people sitting there.

Q. How many people were sitting at the defense table?

A. The defense table—three. I would say three, sir.

Q. How many people were sitting at the prosecution table?

A. It is difficult to say. They were getting up, going and coming all the time. I would say as many as perhaps eight.

Q. Did Judge Boyer get up and leave the room at any time that evening during the session of Court?

A. During the Friday evening session I have no recollection of his leaving.

(497) Q. He merely sat there and did not get up and leave the room at any time that evening during the session of Court?

A. That is correct.

Q. Did you see me there at that session?

A. I don't recall you, sir.

Q. You recall Mr. Curtin, do you not?

A. Yes.

Q. Now, he is a pretty rapid reader, isn't he—talker?

A. Well, I don't say that he is out of the ordinary. I mean he didn't strike me as being out of the ordinary.

Q. How long did it take him to read this statement?

A. How long did it take him ——

Q. Yes m'am.

A. I would say about one-half hour.

Q. Now, did Mr. Achey object in any way to Judge Boyer being in the courtroom that evening?

A. You mean his sitting there as a spectator ——

Q. Yes sir.

A. No sir.

Q. And he was sitting there strictly as a spectator, was he not?

A. As a spectator on that occasion.

Q. Now, Miss Ford, if I say that the statement covers from Pages 814 through 826 in the notes of testimony, would that be helpful to you in ascertaining how long Mr. Curtin —or refresh your recollection as to how long Mr. Curtin read that statement?

A. From Pages 814 to 826 ——

Q. Yes m'am; 12 pages.

A. 12 pages—oh, better than one-half hour.

Q. Double-spaced. You say it is your recollection that would take him about one-half hour?

(498) A. Yes sir.

Q. How long did the evidence or testimony take that was presented that evening?

A. Perhaps one and one-half hour.

Q. And if I told you that the notes of testimony indicate

that that took from near the bottom of Page 769 up to Page 814, would that refresh your recollection in any way—or rather from the bottom of Page 768?

A. May I ask you—if that refreshes my recollection as to the length of time consumed ——

Q. Yes sir.

A. No sir, I am afraid it wouldn't.

Q. Now, coming to the time of the charge by Judge Keller; you recall that quite well, do you?

A. Yes sir.

Q. And at what time did the charge start?

A. I believe that it started at 1:30.

Q. 1:30 in the afternoon; is that correct?

A. Yes sir, I believe.

Q. How long did it take?

A. Approximately one hour.

Q. Now, where was Mr. Biester seated during the period that the charge was being made?

A. Mr. Biester was seated in the chairs reserved for the members of the press immediately opposite the jurors.

Q. Now, Miss Ford, when you say that "reserved for the members of the press" ——

A. And the bar.

Q. —will you show on "Exhibit No. 135" where you mean; where you indicate?

A. I mean in this chair here immediately next to Judge Boyer.

(499) BY JUDGE MURPHY: Will you point it out?

(Witness indicates.)

BY JUDGE MURPHY: The witness indicates the second chair in the front of the second section from the left; the second chair front of the second section from the left.

BY MR. VAN ARTSDALEN:

Q. You mean that Judge Boyer was seated there throughout the charge of the Court?

BY MR. MARGIOTTI: We object because the question was concerning Mr. Biester and now he says "You mean that Judge Boyer * * *."

BY MR. ARTSDALEN: I will clarify it.

BY MR. MARGIOTTI: If you clarify it, I have no objection.

BY JUDGE MURPHY: We will permit that question. Was Judge Boyer seated next to Mr. Biester throughout the charge of the Court?

BY THE WITNESS: Yes sir.

BY MR. VAN ARTSDALEN:

Q. There is also on this diagram a table that intervenes between the place where you have indicated Judge Boyer and Mr. Biester was seated and the counsel table for the District Attorney; is that correct?

A. That is right.

Q. And there are chairs grouped around that table. Were there (500) chairs grouped around that table at the time of the charge?

A. I believe there were.

Q. Were there persons seated there?

A. Not all the time.

Q. Well, were there persons seated there any of the time?

A. Sometimes, yes.

Q. How many persons?

A. Maybe two, maybe three.

Q. Now, as a matter of fact, do you know whether that is also used by members of the bar?

A. No, I don't, sir.

Q. Who was seated at the District Attorney's table during the charge?

A. To the best of my knowledge, Mr. Curtin, the Chief of Detectives ——

Q. Who was he?

A. Ross, I believe.

Q. What did he look like?

A. I don't recall what he looked like exactly. To the best of my recollection, he was not too tall a gentleman.

Q. Who else was seated there?

A. I believe some State Policemen.

Q. Were they in uniform?

A. I don't believe so.

Q. How many State Policemen?

A. Oh, perhaps two, maybe three.

Q. But Mr. Biester was not there?

A. At the time of the charge.

Q. You are quite sure of that?

A. I am quite sure of that, sir.

(501) Q. You say State Policemen. How do you know they were State Policemen?

A. Pointed out to me, sir.

Q. Pointed out to you ——

A. As State Policemen; and the County Detective was pointed out to me as such.

Q. Had any of them testified during the trial?

A. Some of them had, sir.

Q. That were seated there?

A. Yes, I believe so.

Q. Do you remember their names?

A. Not offhand, sir.

Q. Well, you heard their testimony ——

A. The County Detective, I think his name was Ross or Rossi.

Q. Refreshing your recollection—Anthony Russo.

A. Anthony Russo; I am sorry.

Q. You can't recall the names of any of the State Policemen you say were seated there?

A. No sir; I am sorry.

Q. During the charge of the Court did you hear Judge Boyer and Mr. Biester make any statements to each other?

A. No sir.

Q. How close were you seated to them?

A. Approximately eight feet.

Q. All right. Now then, when was it that Mr. Biester got up from that chair?

A. He took the note from Judge Boyer ——

Q. When was it that he got up from the chair?

A. I don't quite follow you on that question.

Q. Can you give it to us in relation to point of time in the (502) charge?

A. Yes, sir.

Q. All right.

A. Judge Keller had finished—practically finished his charge to the jury, looked down at both the prosecution table and the defense table and he said, "Have I forgotten anything? Have I made any mistakes?" or words to that effect.

Q. All right. Did Mr. Biester get up immediately after that?

A. No sir.

Q. He did not?

A. No sir.

Q. How long did he stay there?

A. Judge Keller went on with his closing remarks and had been talking for a few minutes, I would say, when Judge Boyer passed the note to Mr. Biester.

Q. And then did—they were seated together, Judge Boyer and Mr. Biester?

A. Yes sir.

Q. You saw all during the charge?

A. Yes sir.

Q. And you saw Judge Boyer hand a note to Mr. Biester?

A. Yes sir.

Q. You never read the contents of that note, did you?

A. Who? Me —

Q. Yes.

A. No sir.

Q. Do you know what was on that note?

A. No sir. I only know the reaction.

Q. Do you know if there was anything written on that note at all?

A. I only know that Mr. Biester put—no sir.

(503) Q. Did you observe any writing or printing on that note at all?

A. No sir, I did not.

Q. What kind of paper was it?

A. It was a sheet of white note paper.

Q. White note paper?

A. Yes sir.

Q. Was it ruled or plain?

A. I couldn't tell, sir.

Q. Pardon —

A. I couldn't tell, sir.

Q. You weren't close enough to see?

A. I wasn't close enough to see if it was ruled or plain, no sir.

Q. Were they seated at the time the note was passed?

A. Yes sir.

Q. Was anything said between them at that time?

A. I heard nothing, sir.

Q. You heard nothing. Now then, what was the first you observed as to that note?

A. The first that I observed as to that note—I am looking diagonally at Judge Keller and listening very intently —

Q. As matter of fact —

BY MR. MARGIOTTI: May we ask that the witness complete the answer?

BY JUDGE MURPHY: Go ahead.

BY THE WITNESS: Judge Boyer and Mr. Biester were to the left of my line of vision; as I stated before, Mr. Biester was sitting in a very relaxed position with his feet outstretched and his arms resting on the arms of the chair. My attention was di-(504) rected to Mr. Biester as he sat upright in the chair and accepts his note, puts it in reading position; I didn't see words or lines or anything; I just saw him put it in position to read, jump up immediately after reading the note and then go right immediately to the bench, which was some distance away. He had to go to the center of the courtroom and then up to the bench, and he stood there, and, of course, it was a very tense moment. Mr. Biester stood there for several minutes waiting to attract the attention of Judge Keller —

BY MR. VAN ARTSDALEN:

Q. We will come to that again. You did not see Judge Boyer write anything on that paper?

A. No sir.

Q. You don't know, as a matter of fact, whether Judge Boyer wrote anything on that paper?

A. No sir.

Q. You don't know, as a matter of fact, whether there was any communication on that note from Judge Boyer to Mr. Biester, do you?

A. No sir; I do not.

Q. What was done with the note after Mr. Biester stood up in front of the Court?

A. I don't know what was done with the note after Mr. Biester stood up in front of the Court.

Q. Do you have any recollection what happened to the note?

A. No sir. Mr. Biester's back was to me. He stood there for several minutes. I don't know what he ultimately did with the note.

Q. It wasn't handed up to Judge Keller?

A. I couldn't say. His back was to me.

(505) Q. Madam ——

BY JUDGE MURPHY: Do I understand now it is your distinct recollection as of now that you don't know whether Mr. Biester handed anything to the Court?

BY THE WITNESS: No sir; I don't recall. His back was to me.

BY JUDGE MURPHY: You didn't see him hand anything to the Court?

BY THE WITNESS: No sir.

BY MR. VAN ARTSDALEN:

Q. Madam, in order to clarify one part of your testimony, the courtroom is so located—I think you said somewhat similar to this, so far as the bar is concerned; in other words, the judges sit up at a high bench?

A. Yes sir.

Q. In front of that there is another long low bench?

A. Yes sir.

Q. So that it would have been impossible, would it not, that is for Mr. Biester to hand directly to Judge Keller?

A. Directly, yes.

Q. Did you see Mr. Biester at any time go behind the first table and speak directly to the Court at that time?

A. I have no such recollection.

Q. Would you say that did not happen?

A. I have no recollection of its having happened.

Q. Now, Madam, I think that you testified that the Court asked whether there was anything more, or words to that effect, before (506) the note was handed to Mr. Biester; is that correct?

A. That is correct, sir.

Q. Now, do you recall whether the Court said: "Have I overlooked anything?" or "Are there any corrections to be made?" and Mr. Achey replied: "Nothing for the defendant, Your Honor,"—is that correct?

A. Yes sir, to the best of my recollection.

Q. You say the Court went on beyond that?

A. Judge Keller proceeded to make his closing remarks, as I recall it.

Q. How much longer?

A. Oh, perhaps another five or ten minutes.

Q. Before Mr. Biester said anything?

A. Mr. Biester stood up and was standing before the bench for some few minutes before Judge Keller recognized him.

Q. I am not talking about where he was standing—before he said anything?

A. Before Mr. Biester said anything—would you please repeat the question?

Q. You stated after Mr. Achey replied he had nothing further to say, or words to that effect, that the Court went on and closed its charge for a period of about five or ten minutes; is that what you said?

A. That is right.

Q. And the Court did that before Mr. Biester said anything to the Court, is that correct?

A. Before Judge Keller recognized Mr. Biester.

Q. Did Mr. Biester say anything before Judge Keller recognized him?

A. No sir. He was standing before the bench. He said nothing.

(507) Q. He said nothing?

A. That is right.

Q. Madam, if—I ask you whether this portion of the record will refresh your recollection—Page 905 and 906:

"THE COURT: Have I overlooked anything? Are there any corrections to be made?

"MR. ACHEY: Nothing for the defendant, Your Honor * * *."

BY MR. VAN ARTSDALEN: Will the Court now mark my time on this, please?

"—Members of the jury, a word in conclusion. I have instructed you as to what I understand to be the law bearing upon all the questions that arise in this case, as well as the substance of the testimony bearing upon the shooting, as I recall it. I trust I have made myself clear and that I have succeeded in giving it to you so that you comprehend and understand it. What does it indicate to your minds as jurors?

"I may add that in the rendition of your verdict, if you convict this defendant of murder in the first degree, then you will not only have to announce the verdict but also to announce the punishment, what the punishment shall be.

"MR. BIESTER: Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree * * *."

BY JUDGE MURPHY: The actual time you are reading—48 seconds.

BY MR. VAN ARTSDALEN:

(508) Q. Does that refresh your recollection?

A. He didn't go quite that fast. You were reading and not putting any expression in it. He was talking and being very expressive.

Q. Did the Court say anything besides that before Mr. Biester said anything?

A. No sir.

Q. That is your recollection?

A. That is my recollection.

BY JUDGE MURPHY: May I say 48 seconds may or may not indicate anything. The gentleman started at 18 seconds and stopped at 6, so I am taking 18 plus 30 equals 48 seconds.

Let's go on from there.

BY MR. VAN ARTSDALEN:

Q. Madam, would you still say it took—the Court went on for approximately five or ten minutes?

A. Perhaps I am taking into consideration all of the discussion.

Q. Yes. I understood you to say the Court went on another five or ten minutes?

A. To make his closing remarks.

Q. Did Mr. Biester make any remarks?

A. Apparently it didn't take quite that long.

Q. How long do you think it did take?

A. Well, if it took you 48 seconds, it took Judge Keller maybe three and one-half to four minutes.

Q. Now, Madam, if I say to you that that takes up—the portion that I read—less than one page of the notes of testimony, and that the portion that I referred you to that Mr. Curtin read as to the statement, which takes up approximately twelve pages (509) of the notes of testimony, would you still say that Mr. Curtin's statement took about one-half hour to read?

A. May I please have that question again?

BY JUDGE MURPHY: Do you understand the question?

BY THE WITNESS: I believe I do.

Mr. Curtin is reading—he is reading a written statement. Judge Keller is speaking. He is not speaking from any notes. He is speaking—he is making his charge. They are his own thoughts; they are his own expressions, and it is only natural I should think it would take him much longer than reading a written statement.

BY MR. VAN ARTSDALEN:

Q. How long did the charge of the Court take?

A. To the best of my recollection, about an hour.

Q. And the notes of testimony indicate—and the Court spoke more slowly than Mr. Curtin, is that correct?

A. That is my recollection, sir.

Q. Did Mr. Achey make any objection to the statements made by Mr. Biester at the close of the Court's charge?

A. I have no recollection of his making such an objection, sir.

Q. Madam, if I said to you that the charge of the Court, as the notes of testimony are transcribed, takes approximately forty-three pages on the notes of testimony, would that refresh your recollection as to how long the Court's charge was?

A. To the best of my recollection, the charge of the Court lasted approximately an hour.

(510) Q. Isn't it a fact, Madam, that after the Court asked whether he had overlooked anything, Mr. Biester immediately went up?

A. It isn't a fact, sir.

Q. It isn't a fact?

A. It isn't a fact, sir.

Q. So he remained seated there for sometime?

A. Mr. Biester made absolutely no reply nor no answer and continued to sit in his relaxed position.

Q. How long did he continue to sit in his relaxed position after the Court made that statement?

A. Until Judge Boyer passed the note and he took it.

Q. How long after Judge Keller asked, "Have I overlooked anything? Are there any corrections to be made?" was it before Judge Boyer passed the note to Mr. Biester?

A. It might have been a matter of seconds.

Q. It might have been a matter of seconds?

A. Yes.

Q. Did Mr. Biester get up immediately after?

A. Mr. Biester read the note, jumped to his feet and immediately went to the bench.

Q. Then I think you said he wasn't recognized for a matter of five or ten minutes; later I think you changed that; you said it might be three minutes?

A. I said—I believe, sir, that I said he stood there for several minutes. At least it seemed several minutes to me. You must remember the moment was very tense.

BY JUDGE MURPHY: As we understand the situation now, the witness has described that the Court asked a question of counsel and the defense counsel got up and answered but the District Attorney (511) sat there and didn't apparently respond to the Court until Judge Boyer handed him a paper whereupon he sat upright, got up and went to the Court. Whether the paper was a note or not is a problem—a paper is where we are at now—with or without lines, with or without symbols.

BY MR. VAN ARTSDALEN:

Q. Did you bring this fact to the attention of Mr. Achey at that time?

A. No sir.

Q. When was the first time that you brought this fact to the attention of Mr. Achey?

A. I never had any contact or relations with Mr. Achey, Mr. Van Artsdalen.

Q. To whom did you first bring this fact or call attention to this circumstance?

A. We had only discussed it among the family.

Q. When?

A. After it happened. And we have been discussing it for six years.

Q. How long after it happened?

A. That same day, sir.

Q. Did you call it to the attention—did you know whether it was called to the attention of Mr. McBride?

A. Again, sir, I couldn't say. As I told you previously, I had nothing to do with the engagement of Mr. McBride.

Q. You didn't call it to his attention?

A. No sir.

Q. Or anyone connected with his office?

A. No sir.

Q. Now let me just ask you one or two general questions, Miss (512) Ford. Did you observe any disturbances in and about the courtroom when you were there during the Darcy trial?

A. Other than the Friday night session—I mean there seemed to be—by that I don't mean there were any outbursts or anything of that order, but there was an attitude of excitement and crowds and things of that sort at the Friday night session, particularly; at least, that is the one session that so impressed me, sir.

Q. How did the jury come in and go out? Can you point that out on that diagram?

A. I believe there was a door back there somewhere, sir.

Q. Was there a door right where the jury sat?

A. Well, the spectators, I believe, and the witnesses were immediately back of the jury; they sat intermingled, the witnesses and spectators, immediately back of the jury.

Q. I am asking you whether you know how the jury came in and left the courtroom.

A. I believe there was a door to the back of the jury box.

Q. And about how near to the nearest juror?

A. Sir, I would hesitate to say; I don't recall the exact distance.

Q. What I am arriving at is the jury was at no time taken through the main corridor or through the place where the spectators sat?

A. No sir.

Q. How about the defendant—did he also come in and go out by this side door?

A. Yes sir.

(513) Q. And was he at any time taken through the main corridor of the courtroom?

A. No sir. But he was—on more than one occasion he would arrive before Court convened and he would sit here.

Q. You are indicating a chair right in the center section in front of the railing that separates the floor from the benches for witnesses and spectators?

A. Yes sir. He would sit here, as I said, on more than one occasion right before Court convened, and he would be here and, of course, witnesses and spectators and not were seated here.

Q. Were any of the rows of seats barricaded or blocked off so that the people could not sit there?

A. You mean back here in the spectators' section ——

Q. Yes sir.

A. No sir.

Q. What about the row of seats immediately behind the seats you said where the defendant sat?

A. To the best of my recollection, there were people sitting there.

Q. That is the best of your recollection?

A. Yes sir.

Q. Are you sure there were people seated there?

A. I am pretty sure, sir.

Q. Did you at any of the sessions observe attorneys or lawyers handing up papers to the Court?

A. I have no such recollection, sir.

Q. Would you say there were not?

A. You mean to ——

Q. Not connected with this case. Isn't it a fact at the

opening of every session the Court came in and asked whether there were (514) any miscellaneous matters?

A. I must say that I wasn't too prompt in arriving. I didn't arrive promptly as Court convened in the morning.

Q. Do you mean you missed every session on the opening?

A. No. I would say it would not be unlikely that the judges were already on the bench and perhaps if Court convened at 10:00 o'clock, perhaps I would arrive at 10:15.

Q. You mean on the sessions you testified you attended throughout you came in after the Court was on the bench?

A. Not everyone, sir.

Q. What ones?

A. I particularly recall Saturday that I was there very promptly, as well as Monday.

Q. Well, everytime you came in was Judge Boyer seated up there on the bench?

A. Everytime ——

Q. Yes.

A. To every session ——

Q. Yes sir.

A. No sir.

Q. What sessions was it you came in you saw him seated up there with Judge Keller?

BY MR. MARGIOTTI: Isn't that repetition?

BY JUDGE MURPHY: We will take it.

BY THE WITNESS:

A. Which sessions?

BY MR. VAN ARTSDALEN:

Q. Yes sir.

A. It is very difficult to say, sir, because his appearances were (515) so varied and his stays of different durations, it is very difficult to be specific.

Q. Well, I am not asking about how long he was there. I am asking how many times you came into the courtroom when the Court had already convened that you observed both judges sitting on the bench.

A. I am afraid, sir, I can't answer that question.

BY JUDGE MURPHY: Did you, Madam, at any time during the whole trial see lawyers other than those who were in this case appear before the two judges? First, do you understand the question?

BY THE WITNESS: No sir.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Court's question read by the Reporter.)

BY JUDGE MURPHY: —at any time from the time that you arrived in the courthouse for the first time? You understand that?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: For the first time in connection with the Darcy trial until the last time that you appeared in the courtroom in connection with the Darcy trial, did you during that interval, the whole interval, at any time ever see lawyers appear before the two judges other than those connected with the case, so far as you know?

BY THE WITNESS: I do not recall, sir, seeing any other

attorneys who were (516) not connected with the case appearing before the judges.

BY JUDGE MURPHY: Go ahead, gentlemen.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Now, Miss Ford, the District Attorney has read what the Court said after asking "Have I overlooked anything? Are there any corrections to be made?" and His Honor has timed how long it took the Court to say that, but immediately after that Mr. Biester spoke and said:

"Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree."

That thereafter the Court said:

"I specifically stated it was completely abandoned in the case of flight or escape.

"That becomes important only, members of the jury, if you are convinced beyond a reasonable doubt that this shooting of Kelly did not occur during the perpetration of a robbery."

Now, do you remember whether Mr. Biester said anything else after that—after the Court said what it said?

A. Yes sir.

Q. Do you remember that Mr. Biester said—I am reading from the record, Page 906:

"MR. BIESTER: I am sorry but I don't think that would

be beyond a reasonable doubt, that it would be on (517) the preponderance of the evidence that it was during the commission of a robbery. I think Your Honor inadvertently said that they would have to believe that beyond a reasonable doubt that it was not."

The Court said:

"If I did, that will be withdrawn."

And then Mr. Achey asked for an exception.

This all occurred after you saw Mr. Biester standing before the Court and seeking to draw the Court's attention?

A. After he was recognized by Judge Keller.

Q. Will you state whether or not at the time you have—at the two times you have referred when Mr. Biester sat next to Judge Boyer on Friday night for a while and next to Judge Boyer during—at the end of the trial when the Judge charged the jury and you say you observed a note passed from Judge Boyer to Mr. Biester, whether they were in view of the jury?

A. Yes sir.

Q. Were these chairs and tables that have been called to your attention interfering with the view that each would have of the other, if you know?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it.

Were they, the Judge and the District Attorney, sitting where the jury could see them?

BY MR. MARGIOTTI: That is all I want.

Q. Were they sitting where they could be seen by the jury?

(518) A. Yes sir.

BY MR. MARGIOTTI: That is all.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. That is 60 feet away with people in between?

BY JUDGE MURPHY: You have shown they were 60 feet away. We have pictures and a diagram of the courtroom. The question is could the jurors see if they looked? They probably could if they had normal vision if they looked to see.

BY MR. VAN ARTSDALEN: That is all.

(Witness excused.)

BY JUDGE MURPHY: We will take a ten-minute recess.

(Recess.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

MR. JOSEPH DARCY, called and sworn on behalf of the Relator, on direct and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Darcy, have you been sworn?

A. Yes sir.

Q. Mr. Darcy, you are a brother of the Relator in this case?

A. Yes sir.

Q. How old are you?

A. I will be thirty in April.

Q. What do you do?

A. I am an insurance adjuster.

Q. I want you to state whether or not you attended your brother's (519) trial at Doylestown.

A. I did, sir.

Q. How many sessions did you attend?

A. I attended the afternoon session on Wednesday, the afternoon session on Thursday, the afternoon session on Friday and Friday evening, Saturday morning and Monday morning and Monday afternoon.

Q. While you were attending those sessions did you have occasion to mingle with the public in that community?

A. Not particularly. I would park my car and then go right into the courtroom.

Q. Did you have any discussions with any members of the public and citizens of this County in and about Doylestown?

A. No sir.

Q. Concerning your brother?

A. No sir.

Q. All right. Where did you sit in the courtroom?

A. I would come into the main entrance from the front of the courthouse and would turn at the top to the left and would generally sit on the left-hand side in the aisle to the left of the main stairway down leading to the body of the court.

Q. I am going to show you some pictures—rather than the map—and I am going to ask you to look at these pictures, "Relator's Exhibits Nos. 118, 119, 120 and 121," and tell me whether or not any of those pictures would show the position that you usually occupied in attending your brother's trial?

A. Yes sir.

Q. Have you selected one?

A. This picture right here.

Q. You have now selected "Relator's Exhibit No. 121", and does it show approximately the place that you occupied?

(520) A. I would say it does. In through this section I generally sat from the couple of rows down, and sometimes down further in the front.

Q. Would that be the first section or the second section from the left-hand side?

A. I would like to look at the picture again, please.

Q. I am considering—I am calling "left-hand side"; I shouldn't call it the "left-hand side"; the right-hand side. I am considering right to the Judge as the Judge sat.

A. As the Judge sat. In other words ——

BY JUDGE MURPHY: Is there any objection on the part of the Commonwealth to using the very same diagram the other witnesses used?

BY MR. VAN ARTSDALEN: No.

BY JUDGE MURPHY: Is there any particular reason why it shouldn't be used?

BY MR. MARGIOTTI: Because Your Honor suggested marking that diagram somebody would get an idea.

BY JUDGE MURPHY: They have no objection they say, and certainly the Court has none.

BY MR. MARGIOTTI: I thought the Court indicated we should not use it. For that reason it wasn't marked.

BY JUDGE MURPHY: It will help the Court if you will use the diagram.

BY MR. MARGIOTTI: That is what I thought. But I don't want to use the (521) diagram if it is going to aid the witness in selecting the spot that was used by somebody else.

Q. Do you understand the diagram, "Relator's Exhibit No. 135"?

A. Yes sir, I do.

Q. You do. Could you point to the place about where you would be seated during these various sessions?

A. Generally there are places I would sit according to the location—if I could find a seat in this section I would generally sit in this section. That is what I was interested in doing. I would generally sit in this section—through in these seats there.

Q. You are indicating the second section from the right ——

BY JUDGE MURPHY: Would it be near where your aunt was sitting?

BY MR. MARGIOTTI: No. It would be in that same section but it would be toward the end.

BY JUDGE MURPHY: Whereabouts, young man?

BY THE WITNESS: I would generally come down this aisle ——

BY JUDGE MURPHY: The witness indicates the second section as you stand facing the bench in the diagram and about the middle of the section—was it?

BY THE WITNESS: Toward this side.

BY JUDGE MURPHY: Toward the right of the second section which appears on the left side of the diagram as you face the bench, that is as I face the bench looking at this exhibit, the diagram, "Re- (522) lator's Exhibit No. 135".

BY MR. MARGIOTTI:

Q. It was wherever you could get a seat in there?

A. That is correct.

Q. Did you always have the same position or different positions different days?

A. Different positions different days.

Q. In attending this trial will you state whether or not you got to learn who Judge Boyer was?

A. Pardon—will you repeat that?

Q. Did you get to learn who Judge Boyer was?

A. Yes sir.

Q. Did you see Judge Boyer during the trial?

A. I did.

Q. How many times did you see him?

A. I saw Judge Boyer on the bench on Wednesday afternoon, Thursday afternoon, Friday afternoon. That is the limit of it, as I recall.

Q. Three times?

A. Yes sir.

Q. Did you see him any time off the bench?

A. Yes sir.

Q. When?

A. During Judge Keller's charge to the jury on Monday afternoon.

Q. Now when you saw him on the bench those three afternoons that you have mentioned, Wednesday, Thursday, and Friday, I think you said, do you remember how long he was on the bench?

A. A good part of the afternoon; in other words, almost the whole session.

Q. Was he there as Court convened in the afternoon or did he come in (523) while Court was going on?

A. As I recall, he was—as I recall now, the best of my recollection, the fact he came in when the Court had started and had gone out just before the finish for the afternoon. He generally, as I recall, came in that way.

Q. And what part of the bench did he occupy?

A. The seat next to Judge Keller; it would be on Judge Keller's right.

Q. Judge Keller's right?

A. Yes sir.

Q. Who would be then nearest to the jury, Judge Boyer or Judge Keller?

A. Judge Keller.

Q. Did you observe what he did during the three afternoons he sat on the bench?

A. He conferred at different times with Judge Keller when Mr. Biester was interviewing witnesses or cross-examining witnesses.

Q. Were there any conferences when questions came up about objections or anything like that?

A. I suppose so but I didn't ——

Q. Don't suppose.

A. I don't know whether any occurred.

BY MR. MARGIOTTI: I withdraw the question; I withdraw the answer.

Q. The time that you saw him in the body of the courtroom—how many times did you say it was?

A. I recall seeing him once at the charge.

Q. That was at the time of the charge?

A. Yes sir.

Q. And where was he when you saw him?

(524) A. May I point it out on the diagram?

Q. Yes.

A. He was sitting opposite the jury in a section inside the body of the court on a chair there.

Q. Will you state whether or not at that time there was more than one table for the Commonwealth?

A. Yes sir, there was.

Q. How many?

A. I believe there were three or four tables.

Q. And how were they arranged, so far as positions are concerned, length-wise or cross-wise, or what?

A. They were arranged—the first table was in front of the jury and the other tables followed behind.

Q. That is toward where you were sitting?

A. No. I am sitting here. They are right behind the prosecution table as indicated. There was another table right behind the prosecution table and another table.

Q. I see. Where did you point out the place you saw Judge Boyer?

A. In this vicinity here as indicated.

Q. You say in this vicinity here as indicated ——

A. On one of these chairs; that is right.

Q. What do you mean by "as indicated"?

A. I see it has here "Judge Boyer" in the seat here. I know he was opposite the jury.

Q. Do you know whether that was the chair he was on or some other chair near there?

A. Probably he was on one of those chairs near there ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY:

Q. Do you know what chair he was on?

(525) BY THE WITNESS: No sir. I couldn't say, but I know ——

BY JUDGE MURPHY: He said it was in the area where Judge Boyer was marked before. We will let it stand.

BY MR. MARGIOTTI:

Q. Did you observe any other person near him at the time?

A. At the charge I saw District Attorney Biester sitting next to him.

Q. Did you observe anything take place while the charge was going on?

A. Yes sir, I did.

Q. What part of the charge did you observe something?

A. Towards the end of the charge, I believe.

Q. Towards the end of the charge?

A. Yes.

Q. You just tell us what took place and what you observed yourself.

A. Well, I saw Judge Boyer and Judge Biester—District Attorney Biester sitting together in that position. One of the tables were in front of them. I noticed towards the end of the charge Judge Boyer lean forward and write this note. He then handed or passed it to Mr. Biester. Mr. Biester read it, got up, walked across the courtroom floor up to the bench and waited to be recognized by Judge Keller and then interrupted the Judge and then they had a conversation.

Q. You say you noticed Judge Boyer write the note?

A. Yes sir, I did.

Q. What did he write it on?

A. A piece of paper, of note paper, I suppose.

Q. What was the paper resting on?

(526) A. It was resting on—it was resting on the prosecution table—on one of the tables behind the prosecutor.

Q. Do you know what was on that note?

A. No sir, I do not.

Q. Do you know what became of the note?

A. No sir, I do not.

BY MR. MARGIOTTI: You may cross-examine

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Darcy, what adjusting agency do you work for?

A. Employers Group Insurance Company.

Q. How long have you been so employed?

A. I have been there seven years. Prior to that I had one year training under the G. I.—one year's training—with the Owen B. Hunt Adjustment Bureau.

Q. You stated that when you came into the courtroom on these various occasions you usually took a seat over in that one particular section?

A. That is right.

Q. Did you ever have any difficulty obtaining a seat in there?

A. I think I said I would take a seat where I could find one.

Q. Now did you observe—you were there during the Friday night session, is that right?

A. Yes sir.

Q. Did you observe Mr. Biester and Judge Boyer sitting together at any time during that session?

A. I don't recall. It was so crowded, there were so many there, I didn't take particular notice of Judge Boyer or Mr. Biester being together.

(527) Q. You didn't observe it on Friday evening, is that right?

A. That is right.

Q. Now the charge took place what day?

A. Monday afternoon.

Q. Did you have the same seat Monday afternoon that you had Friday evening?

A. I wouldn't say, sir. I said I would take a seat wherever I found one.

Q. Was it approximately the same location?

A. Approximately the same location, yes sir.

Q. How many rows back were you from the—at the spectators' bench—how many rows from the front spectators' bench?

A. When ——

Q. At the time of the charge.

A. At the time of the charge I would say I was in the third row back, right here.

Q. The third row back?

A. That is right.

Q. Are you sure of that?

A. As far as I can remember, I was sitting there in that section, yes.

Q. Did you see Miss Ford there at that time?

A. I don't recall seeing her, no. I was by myself.

Q. You knew Miss Ford at that time?

A. She is my aunt.

Q. Where was Judge Boyer sitting throughout the charge?

A. During the charge he was sitting in one of these seats right here.

Q. You are pointing to one of the chairs in front of the place—of the section where you were sitting, is that correct?

(528) A. As I remember, yes.

Q. There are rows of chairs that circle around in front of the spectators' and witnesses' benches, is that right?

A. As I remember, I would say yes.

Q. Those chairs are separated by a railing, is that correct, of some sort?

A. You mean from spectators inside of the body of the Court there ——

Q. Yes.

A. Yes.

Q. Is that a solid type of railing?

A. I don't know. I didn't go around the floor looking at them.

Q. How high is it?

A. How high is it? I would say it was about two or three feet.

Q. Now at the time of the charge was the courtroom filled?

A. I believe it was pretty well filled, yes.

Q. How many persons were in the courtroom at the time of the charge?

A. Oh, approximately 350.

Q. 350?

A. Yes.

Q. Were there people seated in front of you?

A. Yes, there were.

Q. Were all the seats taken in front—immediately in front of you?

A. That section was pretty crowded, yes.

Q. During the charge—were you observing Judge Keller during the charge?

A. I was observing Judge Keller and Judge Boyer.

Q. Now between the railing in front of the section where you were (529) sitting, how many tables were there up to the place where the jury was?

A. You mean the prosecution table ——

Q. How many tables altogether were there between—in front of the section where you were sitting?

A. Not in front of the section where I was sitting. I am not saying that. I am saying the prosecution tables were in front of the jury. There were three or four tables behind it.

Q. Was that true throughout the trial?

A. As I recall, it was, yes.

Q. During the charge of the Court were there any people seated in front of Judge Boyer?

A. In front of him ——

Q. Yes.

A. You mean at his table or the table that was in front of him ——.

Q. Were there any—was there a table immediately in front of Judge Boyer?

A. Approximately three or four feet in front of him, I suppose.

Q. Do you recall?

A. That I am saying I believe that is how far in front of him it was.

Q. You testified he wrote on a table, is that correct?

A. As I remember, he did.

Q. Was he sitting at a table or one of those chairs?

A. He was sitting on one of those chairs. They weren't using the other two tables in the back, as I recall, just used the first two.

Q. Was anyone sitting between Judge Boyer and the place where the jury was seated?

A. The prosecutor.

(530) Q. How many people were seated at that table?

A. I am just giving a guess—three or four anyway.

Q. During the charge?

A. I suppose there was.

Q. Where was Mr. Biester seated?

A. During the charge ——

Q. Yes sir.

A. He was seated next to Judge Boyer.

Q. Throughout the charge?

A. Throughout the charge.

Q. You are sure of that?

A. Positive.

Q. Now how many tables were there between Judge Boyer and where you say Mr. Biester was seated and where the jury was seated?

A. Three or four.

BY JUDGE MURPHY: At that point we will take a recess until 2:00 o'clock.

(Recess.)

(Court resumes at 2:03 P. M. with all parties, including the Relator, David Darcy, present in Court.)

MR. JOSEPH DARCY, recalled.

CROSS-EXAMINATION (Continued).

BY MR. VAN ARTSDALEN:

Q. Mr. Darcy, will you tell us again, please, where you were seated at the time of the charge of the Court?

A. Yes sir. May I look at the map again? This section right here.

Q. Now you are indicating what is the second section from the left as you enter the courtroom from the corridor, is that correct?

A. That is correct.

(531) Q. And how many rows back were you from the railing that separates the spectators' benches from the main floor of the courtroom?

A. If that is the row of seats, I suppose it would be the third row back.

Q. The third row back?

A. Yes sir.

Q. How far were you from the railing that separates the spectators from the rest of the courtroom?

A. You mean in feet or something like that —

Q. Yes.

A. 10 feet, I suppose.

Q. How far were you from Judge Boyer?

A. How far ——

Q. Yes.

A. Probably about twenty feet approximately.

Q. Judge Boyer was to your left, is that correct?

A. That is right.

Q. But he was on a chair, was he not, immediately in front of this railing that separates the spectators' benches from the rest of the courtroom?

A. Yes.

Q. Now then, did he remain seated there throughout the charge of the Court?

A. Yes.

Q. Are you sure of that?

A. Positive.

Q. And you observed, you say, Judge Boyer write something on a piece of paper?

A. Correct.

Q. Judge Boyer's back was to you at the time, was it not?

(532) A. It wasn't no.

Q. Will you relate what position his body was to you?

A. In the position of my seat I could look off to my left and see Judge Boyer to the left of Mr. Biester.

Q. Well, Judge Boyer was sitting in the same direction as you were, however, was he not?

A. No, he was off to my left.

Q. Was he facing in the same direction?

A. Was he facing in the same direction?

Q. Yes sir.

A. Well, I say the courtroom is a circular direction and if we were facing that way he is facing the jury and my

direction would be facing more or less the bench on an angle.

Q. You mean he was facing the jury and you were facing the bench?

A. That is correct.

Q. Now, where was this—did Judge Boyer get up and go over to the table to write on it?

A. No.

Q. Where was the table in relation to where he was seated?

A. In front of him.

Q. Directly in front of him?

A. Not directly in the front; he was to the side.

Q. How far apart?

A. The right end of the table would be in front of him.

Q. How far from where he was seated?

A. I think he sat three or four feet away.

Q. Did you observe any people walk between where he was seated and that table?

A. Did I observe any people walk between where he was seated and that table?

Q. Yes.

(533) A. No, I didn't.

Q. Wasn't there a passage-way for people to go through?

A. If there was three or four feet there would be a passage-way, wouldn't there?

Q.

A. Yes, there was a passage-way there.

Q. How did he get over to the table?

A. He leaned forward.

Q. Three or four feet?

A. Yes.

Q. You said there was sufficient distance, a passage-way, for people to walk through there?

A. Surely.

Q. Were there any chairs immediately behind the table?

A. No sir, there was not.

Q. You are quite sure of that?

A. Positive.

Q. You affirm your sister's testimony that Judge Boyer and Mr. Biester were seated together throughout the charge?

BY MR. MARGIOTTI: We object.

BY JUDGE MURPHY: Reframe your question.

BY MR. VAN ARTSDALEN: I withdraw the question.

Q. Mr. Darcy, Miss Ford is your aunt?

A. That is correct.

Q. Do you agree with her testimony that Mr. Biester and Judge Boyer were sitting together?

(534) BY MR. MARGIOTTI: We object because the witness can only answer for himself.

BY JUDGE MURPHY: Reframe your question.

BY MR. VAN ARTSDALEN:

Q. Mr. Darcy, was Judge Boyer and Mr. Biester sitting alongside of each other throughout the charge?

A. Yes sir.

Q. And did either of them get up from their chairs during the charge?

A. At the time the note was passed Mr. Biester got up, as I said before, crossed the room and up to the bench.

Q. Did he get up before the note was passed?

A. No.

Q. Was he seated on a chair at the time the note was passed?

A. That is correct.

Q. Was the note held up in the air in some way?

A. No.

Q. How was it passed?

A. It was just passed right to him.

Q. On the table or in the air?

A. He wrote it on the table and just passed it to him. He was sitting beside him.

Q. Didn't you say Judge Boyer was sitting at the end of the table?

A. Yes.

Q. Was he in front or behind Mr. Biester?

A. He was beside.

Q. Immediately beside?

A. That is correct.

(535) Q. Were the chairs that close together?

A. Yes sir.

Q. As you looked over to Mr. Biester and Judge Boyer, what part of their body did you see?

A. I saw the right side, I would say, of Mr. Biester and I could see part of the back and face of Judge Boyer, who was on his left.

Q. Were they seated immediately in front of the railing that separates the spectators' benches from the main floor of the courtroom?

A. I can give you a better judgment on that by saying they were in a line with the jury or behind the prosecution tables.

Q. Mr. Darcy, I want to show you "Relator's Exhibit No. 119", being a photograph of the courtroom. Do you recognize that photograph?

A. Yes.

Q. Now you will observe there are certain chairs, are there not, directly against the railing that separates the main floor of the courtroom from the spectators' benches, is that correct?

A. Yes, that is correct.

Q. Was it on one of those chairs that Judge Boyer was seated?

A. One of those chairs ——

Q. Yes.

A. Yes.

Q. Was it on one of those chairs that Mr. Biester was seated?

A. Yes, sir.

Q. Were those chairs immediately against the railing as depicted in that picture?

A. I would say that they were, yes.

Q. Where was this table?

(536) A. There were, as I said, three or four tables composing the prosecutor or District Attorney's section and they were directly behind each other.

Q. You don't mean to say that Judge Boyer was sitting at the District Attorney's table?

A. No. He was sitting in the chair behind the District Attorney's tables.

Q. How far behind?

A. How far behind what? The District Attorney's table ——

Q. The District Attorney's table.

A. Three or four feet.

Q. Three or four feet beyond the District Attorney's table?

A. He was sitting in that chair and the District Attorney's table was in front of him.

Q. You don't mean to convey he was sitting in a chair immediately behind the District Attorney's table?

A. He was off to the right edge of the table.

BY JUDGE MURPHY: The witness has said he was sitting three to four feet behind the District Attorney's table. That is exactly what he has said.

BY MR. VAN ARTSDALEN:

Q. Now, did Mr. Biester get up immediately after the note was handed to him?

A. After he read the note he got up.

Q. Was the note handed before or after Judge Keller asked the counsel if there was anything else?

A. That I don't remember.

Q. Were you sitting with any other members of your family at that time?

A. No sir; I was seated by myself.

(537) Q. Did you bring this to the attention of Mr. Achey who was trying the case?

A. No sir, I did not.

Q. Who is the first person you brought this to the attention of?

A. Who is the first person I brought this to the attention of ——

Q. Yes.

A. As I said, after the court was finished we discussed the trial and things like that.

Q. Whom do you mean by "we"?

A. At home, my aunt and sisters.

Q. And do you know whether it was brought to the attention of Mr. McBride?

A. No sir, I do not.

Q. You didn't bring it to his attention?

A. No sir; I never met Mr. McBride. As a matter of fact, I never met Mr. Achey.

Q. Did you make any notes of the proceedings at the time that you were there?

A. No sir.

Q. So that what you are testifying from now is recollection only, is that correct?

A. What do you mean by "recollection"?

Q. Well, are you testifying from your recollection of what happened?

A. As I saw it—I am testifying to that.

Q. Have you read the record in this case?

A. No sir.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Darcy, at the time of the passing of the note will you state whether or not Judge Boyer and Mr. Biester were in view of the jury?

A. Yes sir, they were; they were in line with the jury.

Q. All right. Were you there when the verdict came in?

A. Yes sir, I was.

Q. Did you observe the nature of the crowd that was there when the verdict came in?

A. A good-sized crowd, I would say.

Q. Did you observe what, if anything, happened, so far as the crowd and the jurors were concerned?

A. Yes sir. I remember this, that after the jury had returned its verdict and was dismissed by the Judge, why the

jurors then converged with the spectators, and I saw the spectators and the jury, they were shaking hands and patting each other on the back, things like that. They were doing that in the courtroom, up the steps and out into the hallway, I suppose, where they got their pay-checks, I don't know.

Q. All right. You said something about you being—are you a G. I.?

A. Yes sir, I am.

Q. Were you in the war?

A. Yes sir.

Q. What war?

A. The Second World War.

Q. How many years?

A. Four years in the Navy.

Q. Four years in the Navy. Did you see active duty?

A. Yes sir.

Q. Where?

(539) A. The South Pacific, Guam, through the Marianas, and I was on the aircraft carrier Saratoga.

Q. Will you state whether or not you were honorably discharged?

A. Yes sir, I was.

Q. While you entered the jury room—strike that. When you entered the courtroom during the trial of your brother, I want you to state whether or not you observed any person or persons with a mazagine in their hands.

A. Yes sir.

Q. Do you remember the name of the magazine?

A. I believe it is called "The Front Page Detective."

BY MR. VAN ARTSDALEN: I think we have the right to know when this occurred.

BY JUDGE MURPHY: If they don't fix it, somebody else will.

BY MR. MARGIOTTI:

Q. Do you remember when that was?

A. Yes sir, I do very clearly; the first day I appeared in the courtroom.

(Front Page Detective Magazine marked "Relator's Exhibit No. 136".)

BY MR. MARGIOTTI:

Q. I show you "Relator's Exhibit No. 136", and I want you to state whether that is a copy of the magazine that you mentioned.

A. Yes sir, that is.

Q. I call your attention to what appears on Pages 34, 35, 36, 37, and some other pages following. Does that story appear in that magazine?

A. Yes sir, it did.

BY MR. VAN ARTSDALEN: (540) I object.

BY JUDGE WATSON: You haven't offered it.

BY MR. MARGIOTTI: I haven't offered it as yet.

BY JUDGE WATSON: We will get it later then.

BY MR. MARGIOTTI:

Q. I want you to state where you first saw this magazine—in what part of the courtroom?

A. What part of the courtroom ——

Q. Yes.

A. As I entered the courtroom from the main doors, which face the Judge's bench, I saw two young fellows about eighteen or nineteen years old sitting in the top row, right-hand side, with the magazine opened to that story.

Q. To the story that I have just referred to?

A. Yes sir. Now there were other occasions that same day—do you want me to explain that?

Q. Yes.

A. My attention was immediately attracted to that part and I looked over to the left sections here where I saw a group of about fifteen men, I would say, together, it appeared to me, in a party, and they had between them two to three magazines and they had it opened to the part showing the pictures of the boys. This one magazine I saw right here. The other part, I believe, had one showing the aption of the story, and the other magazine was just opened to this part here with the pictures of the boys. They were discussing the thing between them, and I then saw them look at the picture and point down to the defendant and were (541) verifying the fact ——

Q. Don't state what they were doing.

A. I presume that is what they were doing.

Q. Did you hear them say anything?

A. No, I just saw them point.

Q. You saw them point to Mr. Darcy. Now this magazine is dated in June, 1948?

A. Yes sir.

Q. Have you any knowledge when this magazine reached the stands in Bucks County?

A. Well, I could tell you when it was first called to my attention, and that was approximately a week or so prior to the Foster-Zietz trial.

Q. Where did you see it?

A. I was in a barber shop on Frankford Avenue and Bridge Street and while in there the barber asked me if I had seen the magazine or did I hear about it.

Q. It was called to your attention at that time?

A. That is right.

Q. You have no information as to the extent that it was circulated, if at all, in Bucks County?

A. No sir, I do not.

BY MR. MARGIOTTI: If the Court please, we offer "Relator's Exhibit No. 136" in evidence—the magazine "Relator's Exhibit No. 136".

BY MR. VAN ARTSDALEN: It is objected to.

BY JUDGE MURPHY: Well, for what it is worth, if it will throw any light, we will take it.

BY MR. MARGIOTTI:

(542) Q. Mr. Darcy, will you look at the film ——

BY JUDGE MURPHY: Just a minute!

BY MR. MARGIOTTI: I beg your pardon! I am sorry.

BY JUDGE MURPHY: I notice on Page 34 that this refers to a hold-up on the night of December 5, 1947. Is that some other hold-up? The first paragraph: "* * * Bell's Corner near Philadelphia on the night of December 5, 1947 * * *." We understood this killing was on December 22. Page 34, the first paragraph ——

BY JUDGE WATSON: What is the purpose of this?

BY MR. MARGIOTTI: This is for the purpose of showing a publication distributed in the County of Bucks.

BY JUDGE WATSON: What type of publication?

BY MR. MARGIOTTI: A publication that would be inflammatory and would be prejudicial.

BY JUDGE WATSON: Referring to this particular killing—does it refer to this killing?

BY MR. MARGIOTTI: Yes sir, it does. It refers not only to the Feasterville killing but its pages contains the case Your Honor called to my attention; December 5 was one previous robbery ——

BY JUDGE MURPHY: Is it?

(543) BY MR. MARGIOTTI: I think it is.

BY JUDGE MURPHY: It says:

"The two men were looking for trouble—but in their own good time. Nattily dressed, nervously alert, they strolled into the Deppenschmidt tavern at Bell's Corner near Philadelphia on the night of December 5, 1947 * * *."

The indictment here says "December 22, 1947".

"Both were young trim, dark haired. They moved across the floor and mingled inconspicuously with the crowd. One pulled a dollar bill from his pocket and tossed it on the bar. 'Two beers,' he said casually.

"They sipped their brew and cased the joint thoroughly. It was a typical Friday night crowd at 1:30 A. M. Saturday morning * * *."

Does the indictment say Friday night or Saturday?

BY MR. VAN ARTSDALEN: It specifies only the date.

BY JUDGE MURPHY: "December 22, 1947."

BY MR. MARGIOTTI: I call your attention to what appears on Page 37 where the names of the four boys appear.

BY JUDGE MURPHY: I know. I wonder if we are talking about the same case.

BY MR. MARGIOTTI: That is a question.

BY JUDGE MURPHY: (544) Now then, it describes purportedly something that happened on the 22nd. There is talk about the night of the killing—on the first page—on December 5. Then it talks about a man named Watson and Coffin—men named Watson and Coffin ——

BY MR. MARGIOTTI: They were involved in other crimes that were introduced for the purpose of fixing the penalty.

BY JUDGE MURPHY: They say there people were held up, at least the first page seems to convey that fact. That is the Court's recollection.

"Walter Watson chats with George Clinger after a battle with bandits in which Watson's hand was hurt and Clinger was shot in the leg * * *."

There was no Watson or Clinger shot on December 22. There was a man whose named started with "H"—Hellerman. He was brought in in a wheelchair.

" 'Oh, Red!' the girl screamed. 'What have they done?' The bandit menaced her with a gun. 'You're too late,' he snarled. 'The guy's done for.' ".

There is nothing like that in this case, as I recall the evidence.

Now then, on Page 36 ——

BY MR. MARGIOTTI: I am looking particularly at the picture.

BY JUDGE MURPHY: —something about Lieutenant Hanlon, and there was a Lieutenant Hanlon here.

BY MR. MARGIOTTI: And the Feasterville Inn.

(545) BY JUDGE MURPHY: Now according to this calendar which we have, and this would be in 1947, December 22, it was on a Monday night and not on a Friday night. However, there is some discussion here about it. Then there is on Page 37 some mention of "Harold Foster, Harry Zietz, and David Darcy were held on murder charges. A 16-year-old companion was turned over to juvenile officials." So that we will receive it for whatever light it will throw.

So far the evidence is the young man on going into the courtroom—we don't know whether the Court was in session or not—he saw two young fellows eighteen or nineteen with this magazine, which does not bear a publication date. As we see it, there is a copyright date but not a publication date. I may say the Court has presided at a three-week trial on magazines as to how they are published and how they come out. At any rate, he said he saw two young fellows at one time or other and at one time or other he saw fifteen men. We will take it for whatever it is worth.

BY MR. MARGIOTTI: All right.

The magazine is dated June.

BY JUDGE MURPHY: The magazine is dated June. That is no indication when those things come out.

BY MR. MARGIOTTI: I think you are right. I had experience along the same line. It is dated June.

(546) BY JUDGE MURPHY: It has June on it.

BY MR. MARGIOTTI: It has June on it. Whether it comes out in May or June, I don't know.

You want a copy of that ——.

BY JUDGE MURPHY: All right; the offer has been received.

BY MR. MARGIOTTI:

Q. Now then, there was some television film marked for identification only. I am going to have them marked as "Exhibit No. 112". Will you look at that exhibit and tell me whether or not you can recognize anybody on that exhibit?

A. Yes sir, I do.

Q. Who do you recognize?

A. I recognize three men. Would you like me to name them?

Q. Yes sir.

A. Looking in this direction on the left I see Harold Foster; in the center is David Darcy; and on the right is Harry Zietz.

Q. Now I am asking you to look at "Exhibit No. 113"; and do you recognize anybody on that?

A. So far I just see two policemen.

Q. Do you recognize them, whether you see two policemen or not? Do you recognize the policemen?

A. No sir, I do not.

BY MR. MARGIOTTI: May I withdraw "Exhibit No. 113" so marked for identification only. Since it has not been properly identified, I don't want to leave it in the record.

(547) And I offer in evidence "Relator's Exhibit No. 112", in which the witness has identified his brother and two other defendants.

BY MR. VAN ARTSDALEN: That is objected to.

BY MR. MARGIOTTI: This is only offered for the purpose of showing that the defendant and others were televised in the County of Bucks.

BY MR. VAN ARTSDALEN: It is objected to for that specific reason.

BY MR. MARGIOTTI: I think we have a witness from the radio station.

BY JUDGE MURPHY: What was the man's name from WFIL, Philadelphia?

BY MR. MARGIOTTI: Koehler.
I didn't hear you say, Judge, you admit this "No. 112".

BY JUDGE MURPHY: All right, we have testimony from a Mr. George A. Koehler that the exhibit in question was a film fifteen to twenty seconds; we will take it for whatever light it throws. He said it was a silent film; there was no running commentary or at least there is no running commentary available.

BY MR. MARGIOTTI: I think Your Honor is absolutely right.

BY JUDGE MURPHY: This witness is now saying, as we understand it, not that he saw the television but on this film, which was on the screen for fifteen to twenty seconds at some time, that he recognizes the picture of the three defendants.

(548) BY MR. MARGIOTTI: That is right.

Have you ruled on my withdrawal of "No. 113"?

BY JUDGE MURPHY: I understand counsel has a right to withdraw anything he desires.

BY MR. MARGIOTTI: I also want to withdraw "No. 114" because it has no bearing here. It was advertised as an award.

BY JUDGE MURPHY: I have Criminal Docket No. 2 as "No. 114". What is Criminal Docket No. 2? I want to know what Criminal Minute—Criminal Minute Book No. 2—what is the number of it? "No. 115" are the original papers; "No. 114" is the book. What is the number of the Criminal Minute Book? We understood we asked you not to mark the book but put something on the cover. Did you, Mr. Reporter?

BY THE REPORTER: Yes sir.

BY JUDGE MURPHY: That is "No. 115".

What is the number of the original papers in the envelope?

BY MR. KAUFMAN: "No. 116."

BY JUDGE MURPHY: You say the original papers are "No. 116".

All right, let me see the paper that is being withdrawn. Mr. Margiotti has it. All right. The paper—right—1-21-48, Philadelphia Inquirer, is being withdrawn. Go ahead.

(549) BY MR. MARGIOTTI:

Q. By the way, at the time you saw the magazine called "Front Page Detective" that you just referred to, will you state whether or not the Court was in session or not in session?

A. Yes sir, it was.

Q. During the trial?

A. Yes sir.

BY MR. MARGIOTTI: That is all.

BY JUDGE MURPHY: Do I understand you now to say that while the Court was on and the trial was up nineteen men were assembled together in the courtroom looking over a magazine while the trial was on?

BY THE WITNESS: Not nineteen. Approximately fifteen. I noticed approximately fifteen in this one section —

BY JUDGE MURPHY: Standing or sitting?

BY THE WITNESS: Sitting—in a discussion.

BY JUDGE MURPHY: Fifteen of them were discussing this magazine while a murder trial was on?

BY THE WITNESS: Pointing to pictures and pointing to the defendant, yes sir.

BY JUDGE MURPHY: All right.

(550) RE CROSS EXAMINATION

BY MR. VAN ARTSDALEN:

Q. That was on Wednesday you say when you first went in?

A. That is right.

Q. That was the first time you went into the trial?

A. Wednesday afternoon.

Q. The first thing you observed was a couple of men reading the magazine?

A. I observed two boys sitting on the right—called my attention to it.

Q. Where were they—in the rear of the courtroom?

A. Yes sir, at the top section.

Q. On the right as you went in?

A. On the right as I went in the main aisle.

Q. Two of them with a magazine. How far were they from you?

A. I walked right in and stood right there within five feet of them, I suppose.

Q. Were they seated?

A. They were seated.

Q. You went you went to your right?

A. Left. I went in the main aisle section to go to the left. I noticed these men here. I looked down over the body.

Q. You mean in that one look at them you knew what that magazine was?

A. Yes sir.

Q. Had you ever seen the magazine before?

A. I have.

Q. Had you seen it before?

A. Yes, I have.

Q. Before that date?

(551) A. Yes, I saw it before that date.

Q. Where did you see it before that date?

A. On the day it was called to my attention by the barber approximately one week or so before the trial of Foster-Zietz began.

Q. Where were the fifteen men we are talking about that were discussing the magazine?

A. To the left of the main aisle on the first section to the left. They were down approximately the third and fourth seats in a group there.

Q. Was testimony being presented at the time you came in?

A. I believe it was.

Q. What time was it when you came in?

A. Sometime in the afternoon early.

Q. What time do you call "early?"

A. I should say about 2:00 o'clock or so.

Q. Now when you went around to take your seat, you took a seat over in the left of the section you have told us about, did you not?

A. Yes.

Q. Didn't you go around the aisle that is at the top of the courtroom or rear of the courtroom?

A. That is the center aisle. That section splits right there. The main aisle runs into the body of the Court. That is a walk from right to left. That is correct.

Q. You mean you walked down the center aisle?

A. I did not. I walked into the main aisle and right here I decided to go to the left.

Q. "Right here." When you said "right here," you are indicating an opening immediately in front of the doorway in front of the main courtroom?

(552) A. At that aisle.

Q. There is an aisle that goes all the way around the rear of the courtroom?

A. Correct.

Q. As you walked around that aisle that goes all the way around the rear of the courtroom, is that when you observed these men sitting in that section?

A. No sir, it is not.

Q. When was it?

A. Just as I got to this section before turning to the left I observed these two boys here and I observed this group right here.

Q. You observed both groups almost simultaneously?

A. That and then that.

Q. Court was in session at that time?

A. Yes sir.

Q. Did you call that to the attention of the attorney who was representing your brother at that time?

A. No sir, I did not.

Q. Why didn't you?

A. I never met the attorney and I didn't realize the importance of the thing at that time. I was just —

Q. It impressed itself on your mind at that time?

A. It certainly did because I saw it before the trials.

Q. Where was the jury—the jury was in their seats at the time?

A. Yes sir.

Q. And were they observing the witness that was on the stand at the time?

A. I wouldn't know.

Q. Did you look to see?

(553) A. No, I didn't look to see whether they were observing the witness on the stand at the time.

Q. Didn't you look at the jury?

A. I don't remember looking at them, no.

Q. So you don't know where they were facing at that time, do you?

A. Well, their general sitting—you know—was facing across the room. Whether they were looking at the witness on the stand—just who they were looking at, I couldn't say.

Q. For how long a period of time did you notice this magazine?

A. The impact struck me the first time. I paid no more attention to it.

Q. You paid no more attention to it?

A. That is right.

Q. Did you just get a glance at it?

A. At what ——

Q. The magazine itself.

A. No, I had a good look at it. That is the reason I stopped there and observed that.

Q. How long did you stop there?

A. For a minute or so.

Q. Now you say this group of about fifteen were about one-half way in the center section, is that correct—in the center section to the left in about the third and fourth seats down?

A. They were in a group right there.

Q. Were all the seats filled in the courtroom at that time?

A. The courtroom sections that were filled that I noticed later on on that day was through this section on the right, and the sections over here were partly filled to the left.

Q. Was this sectoin filled at that time?

A. Not completely filled.

(554) Q. Weren't the people sitting in the seats that obscured your view?

A. No sir, they were not because I was looking down.

Q. Was the magazine opened at that time?

A. Yes, it was.

Q. And how was it being held?

A. One magazine, the first one, of the group that I noticed was opened to the pictures of the four boys and that is the matter they were referring to and pointing.

Q. Was it held flat in the person's lap or held up?

A. He was holding it more like this and they were all leaning over.

Q. The first one you referred to, you said there were only two boys?

A. I am speaking about the group.

Q. All right, the group; was it being held in somebody's lap?

A. It was being held up.

Q. Were the men in the row back of them looking over?

A. The man in the back row was the one who had the one that I noticed. After I noticed this group, these fellows here, they had their part opened to the picture and were pointing to the picture and the defendant.

Q. Let's get over to the group you are talking about. We are looking at that. Were there some looking over others shoulders to look at the magazine?

A. Well, they were in this group, you see ——

Q. Were they all in the same row?

A. No, they were not.

Q. How many rows were they sitting in?

A. Two.

Q. And the one that had the magazine, was he in the front row, (555) that is the row ——

A. I said there were a couple of magazines there.

Q. You mean this group had more than one magazine?

A. Yes sir.

Q. How many?

A. Two to three.

Q. Can you say which it was, whether it was two or three?

A. I am just making an approximate estimate on it. I believe there were two to three magazines there.

Q. I beg your pardon?

A. I believe there were two to three magazines in that group.

Q. Did you actually see more than one magazine in that group?

A. Yes, I did.

Q. And in which row were the people seated that had those magazines?

A. In both rows.

Q. In both rows?

A. Yes.

Q. You observed all that as you first came into the court-room?

A. That is right.

Q. And were all of these magazines that you saw being held down on the person's lap?

A. I said they were held up and that they were pointing to the picture, and this group were looking over each other

---

BY JUDGE MURPHY: As to the fifteen how were they divided? There were fifteen men looking at this magazine

---

BY THE WITNESS: I said approximately that amount.

BY JUDGE MURPHY: How many were looking at one magazine?

BY THE WITNESS: (556) Well, the group in the third seat down—whatever it was there—there were about five or six.

BY JUDGE MURPHY: They held that up where the Judge could see it?

BY THE WITNESS: It was being held up.

BY JUDGE MURPHY: It was high enough you could see there were people reading a magazine in the courtroom?

BY THE WITNESS: Yes sir; that is right.

BY JUDGE MURPHY: That is the first group of five. What about the others?

BY THE WITNESS: The others were grouped right with them.

BY JUDGE MURPHY: Right next was another group of five?

BY THE WITNESS: No sir.

BY JUDGE MURPHY: A group of how many?

BY THE WITNESS: They were in two rows.

BY JUDGE MURPHY: There were two boys first?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: You said there were two to three magazines besides that—two boys to the rear of the courtroom; you said there were fifteen and one group of five were looking at one magazine. (557) How many were looking at the other?

BY THE WITNESS: I said there were approximately fifteen. I didn't count them.

BY JUDGE MURPHY: The first two boys looking at one; the next five people looking at another; the balance looking at the third?

BY THE WITNESS: They were in the third and fourth seats.

BY JUDGE MURPHY: The two groups were holding them up so that it would be apparent they were reading magazines in the courtroom?

BY THE WITNESS: They were holding them up in that position.

BY JUDGE MURPHY: All right.

BY MR. VAN ARTSDALEN:

Q. Was any objection raised by counsel for your brother at that time?

A. I didn't notice any.

Q. Do you know whether he observed this condition?

A. I don't know that he was aware the magazines were on the stand or anything. I never met Mr. Achey.

Q. Now you have testified you were present when the verdict came in—correct?

A. Correct.

Q. What time of day was it when the verdict came in?

A. In the afternoon sometime.

Q. Around 4:30?

A. I would say in around that vicinity.

(558) Q. The jury were polled, were they not, after the verdict was rendered?

A. That is correct; yes sir.

Q. Was there any applause at the time the verdict was rendered?

A. No, I didn't hear any applause.

Q. Were there any outbursts at the time the verdict was rendered?

A. I don't recall any outbursts.

Q. Any display of any sort at that time when the verdict itself was rendered?

A. At that time when the verdict itself was rendered —

Q. Yes.

A. I don't recall any.

Q. So that it wasn't until after the jury was discharged by the Court that you saw them mingle with the spectators?

A. They left their places and came up.

Q. It was after the Court had dismissed them, is that correct?

A. Yes.

Q. Were the magazines held in such a position that the Judge trying the case could see these magazines?

A. I would say he could see them. His bench was high. He was looking straight ahead.

Q. Did he make any remarks about any magazines?

A. I heard no remarks whatever about the magazines.

Q. Did you see the magazines at any time after that session of the Court?

A. I never looked for them again. I didn't even realize the impact or what it might cause at that time.

Q. But it made an impression on you at that time?

A. Certainly because I was aware of it being on the newsstands prior to the trials.

(559) Q. On this one exhibit, "Exhibit No. 112," you have mentioned—you identified Foster and Zietz, how do you know they are Foster and Zietz?

A. I knew Foster before I went in the Navy. He is from the same neighborhood.

Q. How about Zietz?

A. Zietz—I met him casually, I think, on one occasion when he came to our home.

BY JUDGE MURPHY: I am going to suggest for appellate purposes and for this Court that something be placed with that tape. Instead of them straining their eyes looking for that exposure, somebody ought to mark somewhere where this witness sees these defendants.

BY MR. VAN ARTSDALEN:

Q. On this "Exhibit No. 112," do you know how long this film is?

A. No, I do not.

Q. All right: can you show us where on this roll of film these pictures start that you have referred to?

A. Where they start ——

Q. Yes sir.

BY JUDGE MURPHY: I am talking about the Appellate Court. I presume no matter how we decide it, one way or the other, it will go up.

BY THE WITNESS:

A. Here's the picture right there

BY MR. VAN ARTSDALEN:

Q. Now that is approximately—would you say approximately seven feet from the beginning of the film?

(560) A. I would say more like six feet.

Q. More like six feet. About how far is it from the place where the film apparently contains pictures?

A. Three feet.

BY JUDGE MURPHY: Isn't it possible to inquire from a local photographer, anyone who would know those figures, or Comerford? They have a little clip they put over that portion that won't destroy the film. If you just have him point it out, the Court officer will see that there is a little clip put on that will designate that place.

BY MR. VAN ARTSDALEN:

Q. From that point on will you tell us how many feet of film contain these pictures of these three men that you have identified?

BY JUDGE MURPHY: It looks like a 16 millimeter, doesn't it?

BY MR. VAN ARTSDALEN: I believe so.

BY THE WITNESS:

A. Some of these pictures here there is one boy's head is out. Would you like the point —

BY MR. VAN ARTSDALEN:

Q. How many feet—can you give us how many feet of film there is that shows any of those three persons that you have identified?

A. I would like you to observe one here. It shows just one-half the face like. The last picture that I could identify clearly runs about that point.

Q. Do we have a clip? About how many feet of film is that?

(561) A. What?

Q. From the point where the first picture of these men appears to the point where you have just pointed out.

A. That is approximately four to five feet.

Q. And do you know of your own knowledge how long it takes to show four to five feet of this film?

A. No, I do not.

Q. Now have you examined the rest of this film?

A. No sir, I did not.

Q. Well, will you go ahead and complete the examination and see if there is any other portion that exhibits the three of them?

A. Let's see—this is the beginning ——

Q. This is the last point that you have identified.

A. That I have identified—all right. You see this picture right here. It starts off with one person and it just shows one-half of them and it goes into two parties. Those parties ——

BY MR. MARGIOTTI: Are those parties the defendants?

BY THE WITNESS: Yes sir, they are.

Here I see the police officers here at this point, at the break in the film.

BY MR. VAN ARTSDALEN: May we have another clip, please?

BY MR. MARGIOTTI: What is that mark?

BY MR. VAN ARTSDALEN:

Q. You are putting a clip at that place where there is a break in the film?

A. That is right.

BY MR. MARGIOTTI: (562) What?

BY THE WITNESS: Where the film has been ended and is cut and sealed attaching to the other.

The rest of the pictures here look to me like they are police officers.

BY MR. VAN ARTSDALEN:

Q. You go ahead and examine the rest of the film and see if you find any other pictures on that film.

A. Yes ——

BY JUDGE MURPHY: For the record, Mr. George A. Koehler, the ninth witness called, testified, as we recall it, that on December 23, 1947 the pictures in question appeared on the screen on a silent film for fifteen to twenty seconds.

BY THE WITNESS: It ends here with the police officers and I see the former Mayor of Philadelphia, Samuel.

BY MR. VAN ARTSDALEN:

Q. What do you mean "it ends here?"

A. There is a break

Q. Are there any pictures of any of these three men that you have identified from the last clip?

A. No ——

BY MR. MARGIOTTI: I object to going over the balance of that film as being unimportant.

BY JUDGE MURPHY: You have offered it all in evidence. I suppose that is why he is doing that—to save the eyes of the Judge, I hope.

BY MR. MARGIOTTI: (563) I am satisfied if he wants to go into it.

BY JUDGE MURPHY: Like many other things, it is something that could be done out of Court.

BY MR. MARGIOTTI: What is that?

BY JUDGE MURPHY: I say like a good many other things, it is something that could be done out of Court and come in here with an answer.

BY MR. VAN ARTSDALEN: If the Court please, I believe that the Court stated its recollection of Mr. Koehler's testimony that the film lasted ——

BY JUDGE MURPHY: Fifteen to twenty seconds. He says that the performance on the film—that occurred on the first night—let's see—as we recall it ——

BY MR. VAN ARTSDALEN: Yes.

BY JUDGE MURPHY: He says "Exhibit No. 12" ap-

peared on 12-23-47; that "Exhibit No. 113" appeared on 1-21-48; that "No. 112" ran for fifteen to twenty seconds; that "No. 113" ran for one and one-half to two minutes. So that what we have here is a fifteen to twenty second showing, as we understand it, the night after the killing.

BY MR. VAN ARTSDALEN: That is as we understand it.

BY JUDGE MURPHY: So far we have spent about one-half hour on that. (564) Did you find any more pictures of those three men that you have identified except as to what you put clips on?

BY THE WITNESS: No sir, Your Honor.

BY JUDGE MURPHY: You have not?

BY THE WITNESS: No sir. The rest appears to be a presentation of medals or something.

BY JUDGE MURPHY: In other words, out of this entire film there is approximately eight feet that has any ——

BY THE WITNESS: I will have to check it.

BY MR. PANNELL: You referred to this "No. 112" under date of December, 1947. These labels were loose and we placed them back. Apparently we interchanged "No. 112" and "No. 113." I find in this one here the date of January 21, 1948.

BY JUDGE MURPHY: I will not take it on your say-so. I will take it by what is in the record.

That has any reference to the three men that your have identified?

BY THE WITNESS: It appears to me the entire film has reference to the three men.

BY JUDGE MURPHY: Pictures of them?

BY THE WITNESS: Pictures of the three men. It looks like about eight to ten feet.

(565) BY JUDGE MURPHY: This is a picture of the three, 12-23-47; it would be more likely to be newsworthy then than 1-21-48 on television.

BY MR. PANNELL: Apparently these labels were placed on all right this afternoon with the identification—there is no question—when this was first identified.

BY JUDGE MURPHY: Are you saying now that there was no picture on television at the time of the occurrence; it didn't occur until 1-21-48?

BY MR. PANNELL: It is my recollection of Mr. Koehler's testimony that this one exhibit appeared on 1-21-48 and the other was December.

BY JUDGE MURPHY: Mr. Margiotti has withdrawn one. Which do you desire to withdraw? You make up your mind; it is your choice; and it isn't ——

BY MR. VAN ARTSDALEN: We have no further questions of this witness.

BY MR. PANNELL: We desire to withdraw the one which appeared on December 23, 1947.

BY JUDGE MURPHY: You are now saying—do you—that this picture that has the three boys was not at the time of the killing at all but on January 21, 1948?

BY MR. PANNELL: That is when it appeared.

BY JUDGE MURPHY: That is contrary to the testimony. That is where the (566) record stands. We will take the sworn testimony. At least, this Court can follow its own record. It all boils down to, Judge Pannell, as to whether or not it took fifteen to twenty seconds or one and one-half to two minutes.

BY JUDGE PANNELL: It is the film—one film contains pictures of this Relator and the other doesn't. The one that has no reference to anything in this case Mr. Margiotti withdrew. Unfortunately it wasn't identified when the labels were put on with the identification as to any difference as to date.

BY JUDGE MURPHY: We will take any sworn testimony.

BY MR. MARGIOTTI: I take the position the film that had a picture of Darey was the one we introduced.

BY JUDGE MURPHY: Is it not a difference of whether or not it took fifteen to twenty seconds or one and one-half to two minutes? What other difference is there?

BY MR. MARGIOTTI: There may be some difference.

I only knew of one picture that had a picture of Darcy and that film I adopt.

BY JUDGE MURPHY: You have offered the film in evidence with Darcy on it.

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: What you are disputing, as I understand the English language, is whether it took fifteen to twenty seconds or one and one-half to two minutes.

(567) BY MR. MARGIOTTI: I don't have any dispute.

BY JUDGE MURPHY: If you don't, let's get on. The Court is clear.

BY MR. MARGIOTTI: I don't think it makes any difference.

That is all.

(Witness excused.)

MRS. INEZ DARCY HECKMAN, called and sworn on behalf of the Relator, on direct and cross-examination, testified as follows:

DIRECT EXAMINATION

BY MR. MARGIOTTI:

Q. Mrs. Heckman, are you related to the Relator in this case?

A. Yes, I am.

Q. In what way?

A. I am his sister

Q. At the time of the Feasterville killing and at the time of the trial of your brother were you married or single?

A. I was single.

Q. Where were you staying?

A. I was staying at our home on Larch Street in Philadelphia.

Q. Will you tell me whether or not you went to Doylestown prior to the trial?

A. Yes, I did.

Q. Will you tell me about when you went the first time?

A. The first time was when we were allowed to visit him when he had been moved to Bucks County Prison.

Q. What is that?

A. The first time was when we were allowed to visit him when he had been moved to Bucks County Prison. From then on we made (568) regular visits every week.

Q. Do you remember what month it was—January, February or March?

A. January.

Q. Well then, did you go to see him in January?

A. Yes.

Q. Now when you went to see him did you have occasion to hear people talking about your brother and others involved in the killing at Feasterville?

A. Yes, I did.

Q. And where was that?

A. It was at the Doylestown Inn.

Q. The Doylestown Inn. And whom did you hear discussing it?

A. A group of men at the booth next to mine.

Q. By "booth," what do you mean?

A. I was in the lunch room. As you came into the front door of the Doylestown Inn ——

Q. You mean a lunch booth?

A. Yes. —there was a counter and a booth ran parallel with the counter.

Q. What did you hear them say?

BY MR. VAN ARTSDALEN: I object to any conversation.

BY JUDGE MURPHY: We will take it subject to the objection.

BY THE WITNESS:

A. The conversation concerned "the indictment of the Feasterville killers," and the remarks that the men—the gist of the conversation was to the effect that "they shouldn't go to all that bother, that they didn't deserve a—that they don't deserve a trial."

(569) Q. They shouldn't go to what bother?

A. To the indictment. They were referring to the indictment ——

Q. Yes.

A. —and that "they shouldn't go to all that bother; that they shouldn't have a trial."

Q. Did you hear any other conversations at a later time —strike that. Do you remember who the men were?

A. No, I do not.

Q. Were they strangers to you?

A. Yes, they were.

Q. Now, did you in that Doylestown Inn again hear any further conversation?

A. Yes, I did.

Q. When was that?

A. That was in the warm weather, and from the conversation I recall that it was prior to the trial.

Q. Prior to the trial?

A. Yes.

Q. And what did you hear at that time?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take the entire testimony subject to the objection.

BY MR. MARGIOTTI:

Q. What did you hear on that occasion?

A. The reference was made that "the trial was coming up and that the boys—they should be strung up."

Q. Who said that?

A. Another group.

Q. Another group?

(570) A. Yes.

Q. How many were in the group?

A. Well, I couldn't be precise or accurate on it. I would judge six.

Q. Did you know any of the persons in the group?

A. One man was familiar to me.

Q. Did you know his name?

A. No, but I believe I saw the man in the courtroom at the time of the trial, this one man.

Q. What was he doing in the courtroom?

A. Just a spectator.

Q. I see. Now, did you attend the Foster-Zietz trials?

A. I attended one session of the Foster-Zietz trial.

Q. Do you remember what session that was?

A. I believe it was the Saturday morning session, whenever that was, I am not sure.

Q. And do you recall anything about persons attending that trial, where they were and how many there were and anything like that?

A. Do you mean as to the number in the courtroom

Q. No—if there were any number—yes.

A. No, I really couldn't say.

Q. Now on the occasion of your brother's trial did you attend it?

A. Yes, I did.

Q. Now, will you state whether or not you had occasion on any particular day to observe the nature of the crowd, that is whether it was large or small or medium, or what it was?

A. Well, my general statement on that would be that I can not recall anything less than a large crowd.

Q. Did you hear any conversations while your brother was being (571) tried by women or men?

A. Well, the only occasion that I do recall while my brother's trial was in progress was an afternoon I returned to the courtroom early after lunch and there were so many people in this corridor leading to the courtroom that I was afraid that I was going to faint so I stepped into a room, the door was opened, to the left of the courtroom door; so far as I can remember; it was to the left and close to the courtroom door; and in that instant when I stepped into the room there was a girl working in there and an older man and they were talking and I overheard their conversation. The young girl said to the man, "Well, he doesn't stand a chance either." And the man said, "Well, he's going to get it too."

Q. Now, did you see this magazine that I had in my hand?

A. Yes, I did.

Q. Which Mr. Ryder is now handing up—did you see a magazine like this in that courtroom at any time while your brother was being tried?

A. Yes, I did.

Q. Will you tell the Court how many times and where you saw it and the circumstances under which you saw it?

A. Well, the one specific occasion that I remember ——

Q. That is a magazine. I am referring particularly to "Relator's Exhibit No. 136."

A. —this afternoon session I rushed from lunch and I came into the courtroom and turned left to go to the seat that I generally took and as I was going down the steps I noticed this magazine to my right and I immediately recognized it as the magazine that (572) we had already read; we had had a copy of it and I had read it at home.

Q. Where did you see it?

A. On which occasion—when?

Q. When you first saw it in the coutroom where did you see it?

A. To my right.

Q. In the hand or on a head, shoulder, in a pocket, or what?

A. It was on the lap.

Q. It was on the lap of a woman or man?

A. I couldn't tell you that.

Q. Well, who?

A. Beg your pardon?

Q. Was it the lap of a man or woman?

A. I couldn't tell you that.

Q. Just a person?

A. Just a person, that was just my impression.

Q. How many copies of this magazine did you see in this courtroom?

A. I couldn't be specific but there were a great number.

Q. What do you mean by "a great number?"

A. Well, after I noticed the copies were to my right and I went down and took my place in the first row to my left I looked around then to take particular note if there were other magazines there ——

Q. Of the same kind?

A. Yes. —and I looked over to the left and the spectators on the left and I recognized the front page.

Q. Well altogether about how many would you say you saw?

A. I couldn't say.

BY JUDGE MURPHY: Was it 500 or was it 2?

BY THE WITNESS: (573) No, I wouldn't say there was two. They were just the limited areas that I was able to observe.

BY JUDGE MURPHY: What is your best judgment as to how many you say you saw?

BY THE WITNESS: Perhaps fifteen.

BY JUDGE MURPHY: Fifteen of them all around you, is that it?

BY THE WITNESS: Yes, and to my left.

BY MR. MARGIOTTI:

Q. Now, how many sessions of the Darcy trial did you attend?

A. I attended the Wednesday morning, Wednesday afternoon, Thursday morning, Thursday afternoon, Friday

morning, Friday afternoon, Friday evening, Saturday morning, Monday morning, Monday afternoon.

Q. And will you state whether or not you got to know who Judge Boyer was?

A. Yes.

Q. And when you attended these sessions did you see Judge Boyer?

A. Yes.

Q. Where did you see him?

A. I saw him on the bench and I saw him as a spectator on two occasions.

Q. On two occasions as a spectator?

A. Yes sir.

Q. And how many times would you say you saw him on the bench?

A. I couldn't say definitely.

Q. Did you observe what he was doing on the bench?

(574) A. Well, he was talking with Judge Keller. I mean they would lean over and talk with each other.

Q. Do you remember the occasions that brought about the talk between the Judges?

A. No, I do not.

Q. Now then, you say you saw him on two occasions as a spectator?

A. Yes.

Q. Where was he on those two occasions?

A. He was sitting in the chairs around the semicircle.

Q. Where were these chairs?

A. They were in front of the railing that separated the spectators from the jury.

Q. Where did you usually sit?

A. I generally sat in the first row, the first aisle to the left from the center.

Q. And when you saw Judge Boyer how far would he be away from you?

A. I would say about ten to twenty feet. I am not very accurate.

Q. Can you point to anything in this courtroom which would indicate the distance?

A. I am trying to recall it. Oh, perhaps an angle from here to the last juror's seat there.

Q. I didn't get the answer.

A. On an angle from myself over to the last juror's seat. He was, of course, lower than that.

BY MR. MARGIOTTI: Can we agree what that distance is—twenty or twenty-five feet?

BY JUDGE MURPHY: Have the distance measured from the seat where the witness occupies to Chair No. 12 in the jury box diagonally so we will be precise. We will do it during recess.

BY MR. MARGIOTTI:

Q. Did you see Mr. Biester, the District Attorney?

A. Yes, I did.

Q. Where did you see him?

A. Generally I saw him at the bench and interviewing the witnesses.

Q. And will you state whether or not at any time when you saw Judge Boyer whether there was any other person or persons seated near him?

A. Yes, I saw Mr. Biester with him the one occasion.

Q. Did you yourself ever see anything unusual happen between Mr. Biester and Judge Boyer?

A. No, I did not.

BY MR. MARGIOTTI: You may cross-examine.

BY JUDGE MURPHY: We will give the Reporter and the others a ten-minute recess.

(Recess.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.).

MRS. INEZ DARCY HECKMAN, recalled.

BY MR. VAN ARTSDALEN: During the recess we measured from the witness' chair to the twelfth juror's chair and we found it to be twenty feet.

BY MR. MARGIOTTI: I don't think I will object to the qualifications of the District Attorney.

BY JUDGE MURPHY: Can you stipulate?

(576) BY MR. MARGIOTTI: I will agree to it and I won't object to it.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. I don't believe you were asked how old you are. How old are you?

A. Twenty-five.

Q. Where do you live at the present time?

A. I am living at home on Larch Street with mother.

Q. Do you remember when was the first day you came up to visit your brother at the Bucks County Prison?

A. No, I don't.

Q. You testified, I believe, the first conversation that you overheard took place in the Doylestown Inn, is that correct?

A. That is right.

Q. And can you give us some time when that took place, please?

A. Well, only from the conversation and remembering that they were talking about the indictment.

Q. About the indictment?

A. Yes.

Q. If I tell you that the record indicates that the indictment was found on February 10, 1948, would that refresh your recollection in any way in reference to this conversation?

A. Well, it would just substantiate my own thinking that it was in the winter and it was while David was in the Bucks County Prison.

Q. Was it before or after February 10, 1948?

A. I couldn't say.

Q. In other words, you don't know whether it was before or after the indictment was found, is that correct?

A. Just from the conversation which I repeated to you, testified (577) to.

Q. Well now, the conversation, as I have it in my notes, there was something said about the Feasterville affair and that "the boys should be strung up?"

A. No. That was a later conversation.

Q. All right; what was this first conversation, please?

A. The first conversation was about "the Feasterville killers, they had been ——

Q. What was said?

BY MR. MARGIOTTI: Let her answer the question.

BY MR. VAN ARTSDALEN:

Q. Go ahead.

A. The first conversation that I overheard was about "the Feasterville killers, they had been indicted and that they didn't understand why they went to all that trouble, that they didn't deserve a trial."

Q. Well, it was then after the indictment was found?

A. Apparently.

Q. What did they say about "the Feasterville killers?" How do you know they were referring to that case?

A. They said that they were.

Q. You heard the words "the Feasterville killers?"

A. Yes sir.

Q. That was in the booth next to where you were sitting?

A. That is right.

Q. You don't know who any of those persons were?

A. Not at that time, no.

Q. Did you subsequently identify any of those persons?

A. No.

(578) Q. Was anybody with you at that time?

A. I can't recall.

Q. You mean you don't recall whether you were all alone or with somebody else?

A. I don't recall whether I was all alone or with somebody else. Generally the family—they kept together.

Q. You don't recall about this occasion?

A. I can't say who was with me.

Q. You can't give us any closer point of time than you have already given?

A. No, I can't.

Q. This second conversation, can you give us any closer point of time than it was warm weather —

BY JUDGE MURPHY: Do I understand you to say now

you were not permitted to see your brother from December 22 until February?

BY THE WITNESS: No, Judge; we were allowed to see him.

BY JUDGE MURPHY: I understood you to say this was the first time you were allowed to visit your brother this occurred?

BY THE WITNESS: I said the first conversation I overheard was sometime between the time that David was first brought up to the Bucks County Prison and the point I overheard the conversation, because I visited every Saturday at Doylestown starting approximately January.

BY JUDGE MURPHY: Go ahead.

BY MR. VAN ARTSDALEN:

Q. This conversation you heard the second time, that was also in (579) the Doylestown Inn?

A. That is right.

Q. Was it at noon-time?

A. Yes, we were having lunch, as I recall.

Q. All right. Are you sure it was noon-time or not?

A. Whether it was precisely noon-time, I can't say.

Q. How do you know they were talking about this particular case? What was said that makes you come to that conclusion?

A. Well, the reference to "Feasterville."

Q. What was the reference to "Feasterville?" You mean that is what you heard, the word "Feasterville?"

A. "The Feasterville killers are going on trial."

Q. You are sure they used the term "Feasterville killers"?

A. That is what drew my attention.

Q. It was the same term you used the first time you overheard any conversation?

A. Yes.

Q. You say there were about six persons there, were they sitting eating somewhere?

A. I would say that there were two standing and four seated.

Q. Was this in the dining-room?

A. No.

Q. In the grill?

A. Yes.

Q. Were you at a booth?

A. Yes.

Q. Were these men seated, the ones that were seated, or at the bar?

A. There were two that were standing at the table and four sitting in the booth.

Q. How long did that conversation take place that you overheard?

A. Well, I couldn't say.

(580) Q. Can you give us any idea?

A. No, I can't.

Q. Was it more than just a very few short seconds such as you have related?

A. Yes, it was just a general conversation and rehash of the incident.

Q. Now you say you heard someone say "The boys should be strung up." Did they specify any particular one?

A. No.

Q. Did more than one person say that?

A. Just general conversation.

Q. Now the one session you attended of the Foster-Zietz trial, was on Saturday morning?

A. As I recall, yes.

Q. You don't know how many persons were present?

A. No, I can't say.

Q. Now, if I understood your testimony, you attended your brother's trial from Wednesday morning every session thereafter, is that correct?

A. That is correct.

Q. And where did you sit on those occasions?

A. The first aisle to the left from the center aisle down in the first row.

Q. Did you attend any of the sessions with any of your relatives?

A. Generally, yes.

Q. Which ones of your relatives?

A. My sister Rita, my sister Jean and I generally stayed together.

Q. Did you see your aunt there on any occasions?

A. Yes.

Q. Did you sit with her on any occasions?

(581) A. I can't say.

Q. You mean you are not sure?

A. I wouldn't want to testify that I did or I didn't.

Q. Did you sit with your brother, Mr. Darcy, on any occasions—Joseph?

A. The same would apply to him.

Q. You mean you are not sure whether you sat with him on any occasions, is that right?

A. No, I wouldn't say I am not sure.

Q. Do you think you did or did not sit with him on any occasion?

A. I would say that I did not.

Q. You did not. Did you see him there at the trial?

A. Yes.

Q. Did you talk to him at the trial?

A. Yes.——

Q. Do you know what sessions or how many sessions you saw him there?

A. No, I don't.

Q. Now, Mrs. Heckman, the first day that you came in was on Wednesday; as I understand it, that is the time you testified you almost fainted; is that correct?

A. No, I don't think I specified.——

Q. What day was that?

A. I can't be specific as to the day.

Q. You mean you don't know?

A. I would say I don't know which day it was.

Q. So that you don't know which day it was you heard this conversation in one of the rooms off the main courtroom, is that correct?

A. That is correct.

(582) Q. And the only conversation that you overheard —am I right—is that "He doesn't stand a chance either." "He's going to get it too." Is that correct?

A. That is right.

Q. You don't know to whom they were referring, do you? Was any name mentioned?

A. Well, the murder trial.

Q. What was said in their conversation?

A. This young girl and this man were talking about the murder trial and referred to the crowd in the corridor.

Q. What precise words did you hear?

A. I quoted the precise words.

Q. Did you hear anything else besides that?

A. Other than the reference to the murder trial ——

Q. What was the reference that was made?

A. Well, about the crowd the first thing, the crowd in the corridor.

Q. Isn't it a fact, Mrs. Heckman, that the words "He

doesn't stand a chance either." "He's going to get it too," you did not know whether they were referring to Darcy or to someone else in the Feasterville Inn hold-up, or if they were referring to an entirely different situation or case?

A. I wouldn't say they were referring to an entirely different situation or case. I understood it was in reference to the trial that was going on.

Q. Now, what session was it when you saw these fifteen magazines in Court?

A. I can't be specific. It was an afternoon session.

Q. Was it the first afternoon?

A. I said I can't be specific.

(583) Q. In other words, you can't tell at all—give us any idea other than it was one of the afternoon sessions that you attended?

A. That is right.

Q. Was it the same afternoon that you fainted?

A. That I can't recall. I didn't faint. I said I felt faint.

Q. That you felt that you were going to faint—excuse me?

A. Yes.

Q. Now at the time you came in when you saw those magazines, was Court in session at that time?

A. No, not at the time I came in.

Q. It was before Court was in session?

A. Yes.

Q. Was the jury in its box?

A. That I can't recall.

Q. Do you know whether the Judges were on the bench —or either of the Judges?

A. No, I don't recall.

Q. Now then, I believe that you stated that you took particular note of these magazines, is that right?

A. That is right.

Q. And you had seen these magazines before, is that correct?

A. That is correct.

Q. Where had you seen them before?

A. At home.

Q. How did it come about you had one of these magazines at home?

A. Because my brother Joseph has already testified we found out about this magazine and we purchased copies of it and we read it at home.

Q. So that you discussed the article in that magazine prior to (584) coming to Doylestown for the trial, is that right?

A. That is right.

Q. Did you call the fact you had read this article to the attention of the attorney for your brother?

A. No, I didn't know the attorney.

Q. Did you tell your brother, the defendant—the Relator here—about it?

A. No, I did not.

Q. Did you ever tell him about seeing these magazines in Court?

A. Tell whom ——

Q. Your brother, the Relator.

A. No sir, I did not.

Q. You never told his counsel about it, is that correct?

A. I didn't know his counsel. His counsel didn't confer with us.

Q. Did you call it to the attention of anyone else—the fact these magazines were in the courtroom?

A. We discussed it.

Q. Among the family. Did you call it to the attention of any single outsider at that time?

A. Not that I recall.

BY JUDGE MURPHY: I understand you and your brother said you didn't even speak to the attorney. Do you have any idea who hired him?

BY THE WITNESS: My father.

BY JUDGE MURPHY: Your father.
Did your father talk with him, to your knowledge?

BY THE WITNESS: (585) On very few occasions.

BY JUDGE MURPHY: Were they on speaking terms, your father and the lawyer he hired?

BY THE WITNESS: Not very good speaking terms, I wouldn't say.

BY JUDGE MURPHY: Even before the trial?

BY THE WITNESS: That is right.

BY MR. MARGIOTTI: What is that?

BY JUDGE MURPHY: She said "That is right." They weren't on speaking terms, her father and the lawyer.

BY THE WITNESS: I didn't say that, Judge.

BY MR. VAN ARTSDALEN:

Q. When you discussed it with your family how long after this incident was it?
A. That the family discussed it ——
Q. Yes m'am.

A. That was immediately after the verdict was rendered and we were talking about the whole trial.

Q. After the verdict. Was your aunt present at that time—Miss Ford?

A. I do not know.

Q. You don't recall?

A. I don't recall.

Q. Who was present?

(586) A. I couldn't say. Just the family, so far as I am concerned.

Q. Just members of your family, no one else. Now, to your knowledge, when was the first time the incident about the magazines was first reported to anyone outside the family?

A. I am not in a position to say. I don't know.

Q. Did you report it to anyone outside the family prior to this hearing today?

A. No—to Mr. Margiotti.

Q. You did discuss it with Mr. Margiotti, of course?

A. Yes.

Q. And when was the first time you discussed it with him?

A. I couldn't say.

Q. To the best of your recollection?

A. A few days ago, I suppose.

Q. A few days ago?

A. Yes.

Q. Do you know whether—do you know how Mr. Achey was employed in this case?

A. He was referred by two of his co-workers in Common Pleas Court No. 6, Philadelphia, to Mr. Achey in Doylestown.

BY MR. MARGIOTTI: Who was?

BY THE WITNESS: Daddy.

BY JUDGE MURPHY: Her father was, which is obviously hearsay. We will take it. It is being given—you proved it before and they are proving it again. At least, this is the second time it is in—yes, that the father, who is not here, engaged Mr. Achey because (587) of some recommendation by two other gentlemen ——

BY MR. MARGIOTTI: In Philadelphia.

BY MR. VAN ARTSDALEN:

Q. You saw Judge Boyer, I think you said, on the bench with Judge Keller at various times when the case was being tried, is that correct?

A. That is correct, sir.

Q. Was any objection raised at any time by Mr. Achey, that you know of, to Judge Boyer being on the bench?

A. Just on the one occasion that is in the testimony. I recall no other.

Q. Did you hear what was said at that time Mr. Achey raised that objection?

A. No, I didn't.

BY MR. VAN ARTSDALEN: That is all.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

BY JUDGE MURPHY: Yesterday about adjournment time we inquired of counsel for the Relator. He said then he thought he would be finished at noon today. We make

the same inquiry because we have had to continue pretrials three days. We want to know about the time. Can you give us some idea how long your side will take? The morning paper says twelve days.

BY MR. MARGIOTTI: My opinion is we are through now except for this, I would like to check on our various matters overnight. If there (588) is anything left I would like to introduce it in the morning. I don't think there is. I would like to check those at the hotel. There is a dispute between Mr. Pannell and myself on these films.

BY JUDGE MURPHY: I understood you to say you had ten witnesses ——

BY MR. MARGIOTTI: I am inclined to believe if we come in in the morning ——

BY JUDGE MURPHY: Will Rogers said "I know more than I read in the newspapers."

You said you would take about ten witnesses—the other side. Is that your best estimate?

BY MR. VAN ARTSDALEN: That is my best estimate, and on direct-examination I would not anticipate any of the witnesses would take more than three-quarters of an hour to an hour. How long on cross-examination, I don't know.

BY MR. MARGIOTTI: These two films, there is only one way we can settle the dispute, Judge Pannell and myself, and that is to examine them. If the Court will permit us to do it at the hotel rather than here—if the Court will permit it ——

BY JUDGE MURPHY: Those exhibits better remain in the custody of the Court because of the confusion that is there.

BY MR. MARGIOTTI: I don't know now which is which.

BY JUDGE MURPHY: I don't either. But there are three films now.

(589) BY MR. MARGIOTTI: No; there are only two.

BY JUDGE MURPHY: There are two boxes.

BY MR. MARGIOTTI: There are two boxes, one film. That film goes in the box. There is a little yellow paper that goes with that. There it is. That film goes in there.

BY JUDGE MURPHY: What we will do—why can't you arrange with someone on your side and someone on the other side to just step into Mr. Prestwood's or a half dozen other places in town—better yet, Tony Sandone's place right under the Scranton Tribune, and they will snap them on and you will see the picture run through in a second and you won't have much trouble? You send a representative and Mr. Margiotti will send a representative and come in and tell us what you saw.

BY MR. MARGIOTTI: That is a good suggestion. I would like to do it.

BY JUDGE MURPHY: Mr. Foley, are you going to be busy with the prisoner?

BY MR. FOLEY: Not once I leave the Court.

BY JUDGE MURPHY: You take the films up and see that they are seen by both sides and then return them to the Court Reporter, and then you will know where to go.

(Court adjourns for the day at 4:03 P. M.)

(Court resumes on Thursday, March 18, 1954 at 10:00 A. M. with all parties, including the Relator, David Darcy, present in Court.)

(590) BY MR. MARGIOTTI: Following the suggestion made by the Court last evening, we had these films run and I wasn't there, I had a representative there. Mr. Lawley was there. I am satisfied with his reporting to the Court the facts as they actually were.

BY MR. LAWLEY: We observed the shorter of the two films, which is in two pieces. They show two police officers and they ran a total of 36½ seconds, the first piece running 5 seconds, the second piece running 31½ seconds, at silent speed on an Ampro Compact Sound Projector, 16 millimeter, which was operated by Joseph Sandone of the Scranton Photo Shop.

Now the longer film, which is the one marked with the clips attached, is in one piece and was run with the same equipment and by the same operator, and it shows four boys, including David Darcy, who were on the screen for fifteen seconds. David Darcy appeared on the screen for ten seconds, and the entire film runs four minutes and nine seconds. The remaining portion of the film shows there is a sign that four received hero awards. The rest of the film is the presentation of those awards somewhere in City Hall to policemen.

BY MR. MARGIOTTI: I think we had the right film

introduced. The question that arises is whether we had the proper identification slip—or not.

BY JUDGE MURPHY: On one, the so-called short film, there are so-called police officers. Did they have anything to do with this case?

BY MR. MARGIOTTI: (591) Whether they had or not, we will withdraw that. I don't think it has any material bearing on the case.

BY JUDGE MURPHY: The question is there is a film, whatever film it is, we will take it as the first of the two numbers, "No. 112," and you withdraw "No. 113," is that it?

BY MR. MARGIOTTI: If that is the correct designation. These slips are off. They came off naturally.

BY JUDGE MURPHY: Well, at any rate, we will consider then that one of the films is withdrawn. You withdraw that?

BY MR. MARGIOTTI: Yes sir.

BY JUDGE MURPHY: We will consider the other as the two numbers. Then there is no problem.

BY MR. MARGIOTTI: Taken as shown January 21, 1948.

BY JUDGE MURPHY: How do you know that?

BY MR. MARGIOTTI: There is a yellow slip, Judge, in the container, and the witness who appeared said that designated the date it was shown and he had so marked it.

BY JUDGE MURPHY: That is certainly a confusing circumstance. You have now pictures of boys, you have it shown three or four weeks (592) after in connection with the other and not contemporaneous with the killing itself.

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: As to whether or not we will agree to that, you can put whatever you want on the record on that circumstance.

BY MR. MARGIOTTI: I will put the yellow slip in as the witness produced it and put the film back in the container.

BY JUDGE MURPHY: There is nothing in this record, so far as the Court can recall, about any yellow slip.

BY MR. MARGIOTTI: Yes, there is. The witness testified about it.

BY JUDGE MURPHY: We don't recall it. We will see the record.

Is the Commonwealth stipulating that these pictures were not run on December 23, 1947, but on the contrary were run January 21, 1948?

BY MR. LAWLEY: We believe the evidence of Mr. Koehler would speak for itself, Your Honor. I don't believe we will stipulate as to that.

BY MR. MARGIOTTI: We will stand by the record.

BY JUDGE MURPHY: All right.

BY MR. MARGIOTTI: Now, Your Honor, I told you last evening we would probably close early this morning. I have just one more witness (593) and then we will be through.

MISS MARGARET C. GORDON, called and sworn on behalf of the Relator, on direct and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Miss Gordon, where do you live?

A. Philadelphia.

Q. What is your address?

A. 5025 Frankford Avenue.

Q. What is your business?

A. Real estate and insurance.

Q. I want you to state whether you are related to Mr. Darcy, the Relator in this case.

A. No, I am not, sir.

Q. And I want you to state whether you attended the Darcy trial.

A. I attended some of the sessions, yes sir.

Q. And with whom did you attend the trial?

A. On some occasions I attended the trial with members of the Darcy family and with Miss Ford, the aunt.

Q. Miss Ford?

A. Miss Ford, yes sir.

Q. Will you tell the Court what sessions you did attend?

A. I attended three sessions on Friday, one on Saturday morning and two on Monday.

Q. Are they the only sessions you attended during the trial?

A. Yes sir.

Q. And during that time did you learn who Judge Boyer was?

A. Yes, I did.

Q. Will you state whether or not you saw Judge Boyer in the courtroom?

(594) A. I saw Judge Boyer in the courtroom on—let me see ——

Q. Answer the question.

A. Yes sir.

Q. At the time you saw him can you give us the session or sessions?

A. I believe I can, sir. I think on Friday morning he was in the courtroom, Friday afternoon, Saturday morning, and, to the best of my knowledge, on Monday morning.

Q. Now I want you to state at the time you saw him what was he doing.

A. On the occasion of Friday in the morning and afternoon session I saw Judge Boyer on the bench. The same is true of Saturday morning and, to the best of my knowledge, again on Monday morning it was on the bench.

Q. What was he doing on the bench?

A. I recall on the afternoon session that Judge Boyer conferred with Judge Keller and ——

Q. On what occasion?

A. I think it was on an occasion when there was some objection by Mr. Achey and some answers or rulings of some sort were made at the time.

Q. I see. Did that happen more than once, if you recall?

A. I think that on Friday it happened more than once. I would say it happened on perhaps three or four occasions.

Q. Did it happen on any other day besides Friday?

A. It happened on Saturday morning.

Q. On how many times did it happen on Saturday morning?

A. On Saturday morning—I would say that it happened three or four times on Saturday morning.

Q. Now, were you in Court at the time Judge Keller charged the jury?

A. Yes, I was, sir.

(595) Q. And where did you sit, Miss Gordon?

A. I sat on the right side of the courtroom.

Q. You mean the right side as the Judge was sitting?

A. That is right, yes sir.

Q. Where did you sit with reference to Miss Marion Ford, who has been on the witness stand?

A. You mean ——

Q. Where did you sit relative to her?

A. Each day ——

Q. No; that particular day.

A. That particular day I sat next to Miss Ford in the second row.

Q. The second row?

A. Yes sir.

Q. Did you observe whether or not Judge Boyer was in the courtroom during that charge?

A. Yes, Judge Boyer was in the courtroom during that charge.

Q. Where was he, Miss Gordon?

A. He was sitting in the chairs reserved for members of the bar.

Q. Do you know whether—what chair he was—the first, second or third from the end?

A. I couldn't say it was in the end chair he was seated. Whether it was the second or third chair, I am not sure.

Q. Will you state whether or not you saw any person seated near him at that time?

A. Seated next to the Judge was the District Attorney Mr. Biester.

Q. Now, did you observe anything unusual occurring on that occasion—on the occasion of the charge?

A. Yes, I did, sir.

Q. Will you tell now—speak out loud so that the Court can hear you—what you observed?

(596) A. It was during the charge the Judge Keller—almost the close of the charge, I would say ——

Q. Almost what?

A. Almost the close of the charge, I believe it was, to the jury, and the Judge stopped to inquire whether or not everything was in order, if there was any additional information he should have—official words to that effect. I know that Mr. Achey answered that but it wasn't answered by anyone—Mr. Biester ——

Q. Then what happened?

A. Then the Judge proceeded to make his final charge to the jury, as I recall it ——

Q. Finish his charge?

A. Finish his charge to the jury. It was during that period that I noticed—as a matter of fact I was looking at Judge Boyer at the time—it was during that period I noticed that a note was being handed to Mr. Biester ——

Q. By whom?

A. By Judge Boyer.

Q. What did Mr. Biester do with the note?

A. Mr. Biester straightened in the chair and read the note—and straightened in the chair and immediately he got up from the chair and went to the bench.

Q. Now prior to your seeing the note being handed by Judge Boyer to Mr. Biester did you observe anything else, or was that your first attention to the note?

A. My first attention—I think my first attention to the note was the raising of Judge Boyer's arm. I was looking that way. I noticed the note was being passed to Mr. Biester.

Q. Did you see any person do any writing on that note?

(597) A. No sir.

Q. When Mr. Biester then went to the bench what did he do?

A. He stood there to attract the Judge's—Judge Keller's —attention.

Q. Was he finally recognized?

A. He was finally recognized by Judge Keller.

Q. Without stating what he said—because we have the record here—do you remember whether he said anything?

A. He thought there was some kind of error made of some kind. I don't recall what that was.

Q. At that time, the time this note-passing took place, will you state whether Judge Boyer and Mr. Biester were in a position where they could be seen by the jurors if they had looked?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained. We have had evidence of the location of the jury box, and she can describe the condition of the courtroom and what, if anything, there was between the jury and the two gentlemen in question if they were where she said they were.

BY MR. MARGIOTTI: Yes sir; all right.

Q. Was there anything between the jurors and the Judge and Mr. Biester at the time the note was passed that would obscure the view of the jury?

A. Other than a table or two, sir; I would say that is all.

Q. Can you tell me—do you understand this map, which has been marked "Relator's Exhibit No. 135?"

A. Yes, I do, sir.

BY MR. MARGIOTTI: (598) If Your Honor please, for the record we have agreed that this map is on a scale of one-fourth inch equals one foot.

Is that right?

BY MR. VAN ARTSDALEN: That is correct.

BY MR. MARGIOTTI:

Q. Can you tell me about where you were sitting? Will you point to it?

A. I was seated about there. (Witness indicates.)

Q. Pointing now to the second row ——

A. There was an aisle there; as I recall it. I was in through here. (Witness indicates.)

BY MR. MARGIOTTI: Would Your Honor have objection if she placed a "G" on there?

BY JUDGE MURPHY: No.

BY MR. MARGIOTTI:

Q. Just put the letter "G" where you were.

BY MR. VAN ARTSDALEN: We object to this exhibit being marked.

BY JUDGE MURPHY: Well, we have got that before

and we already have a mark there, and she said she sat next to Miss Ford. Therefore, she will be next to the one that is on there—no, it is on Boyer—Judge Boyer. Let her put a "G" where she sat.

(599) (Witness marks on the exhibit a "G" where she sat.).

BY THE COURT: We ask the District Attorney: Is it your recollection she is now placing a mark at the point where we have previously indicated in the record Miss Ford said she sat?

BY MR. VAN ARTSDALEN: I believe that is correct.

BY MR. MARGIOTTI:

Q. Can you point to the place where Judge Boyer and Mr. Biester were?

A. It was over in this section, Your Honor.

BY MR. MARGIOTTI: She says "It was over in this section." She is pointing to the furthest chair which says "Judge Boyer," the one next to it towards the center of the room and the one next to that towards the center of the room.

BY JUDGE MURPHY: She is pointing exactly to the chair that Miss Ford marked.

BY MR. MARGIOTTI: Not exactly. She points to three chairs.

BY JUDGE MURPHY: Were they the first two or second and third?

BY THE WITNESS: Yes.

BY JUDGE MURPHY: Were they on the first two or second and third?

BY THE WITNESS: To the best of my knowledge, he sat over in this section. I am not certain whether it was the second and third or first and second.

(600) BY JUDGE MURPHY: All right.

BY MR. MARGIOTTI: You may cross-examine.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Miss Gordon, when did you first learn of this case?
A. I would say perhaps a day or two after it happened.
Q. And you are a friend of Miss Ford's, is that correct?
A. Yes sir.
Q. Are you a friend of the Darcy family?
A. Yes sir.
Q. And were you at the time of this occurrence?
A. No. At the time of this occurrence I was a friend of Miss Ford's only.
Q. All right. Have you any business connections with Miss Ford?
A. None whatever.
Q. Do you run your own real estate and insurance agency?
A. No sir, I am associated.
Q. With whom?
A. M. C. Hild.
Q. M. C. Hild. Where is that business office?

A. 5043 Frankford Avenue.

Q. What was the occasion of your going to the Darcy trial?

A. As a friend of the family's I was interested in the case.

Q. You were a close friend of the family?

A. Not at that time. I was a close friend of the aunt.

Q. You came to Doylestown on what date?

A. The 11th. It was on a Friday.

Q. It was on a Friday?

A. Yes sir.

(601) Q. Did you stay in Doylestown during that period of time?

A. No, we went home in the evening.

Q. You went home every evening?

A. Yes sir.

Q. When you came Friday with whom did you come?

A. I came with members of the Darcy family.

Q. Who were they, please?

A. It was the father; I believe it was the daughter Jean; I am not certain, sir.

BY MR. MARGIOTTI: What?

BY THE WITNESS: The daughter Jean.

BY MR. VAN ARTSDALEN:

Q. You did not come with Miss Ford on that occasion?

A. Not on that occasion; not on Friday.

Q. So that you were a friend of the family at that time, as well as Miss Ford?

A. That is right. I knew the family.

Q. And then you say you saw Judge Boyer on the bench Friday morning, is that correct?

A. Yes sir.

Q. And did you get there before Court started?

A. Yes sir, we did, sir.

Q. You were there when Court came in?

A. Yes sir.

Q. Did both Judges go up on the bench?

A. Yes sir.

Q. How long did Judge Boyer remain there Friday morning?

(602) A. As I recall it, the Judge left—I can't say in what space of time, and it is my recollection that he came back on the bench during the morning.

Q. Did he make any statements during the course of that morning while on the bench that you heard?

A. Not that I heard, sir.

Q. Did he make any statements to the jury?

A. Not that I heard, sir.

Q. Did he make any statements to Mr. Achey or to any of the attorneys there that you can recall?

A. Not that I can recall.

Q. Did he make any statements to any of the witnesses?

A. Not that I can recall.

Q. Did he ask any questions?

A. No, not that I can recall.

Q. Now you attended the Friday afternoon session, is that correct?

A. Yes sir.

Q. You say Judge Boyer was there on that session?

A. Yes sir.

Q. Was he on the bench Friday afternoon?

A. Yes sir.

Q. For how long a period of time?

A. I would say—on Friday afternoon—perhaps one-half hour on the bench.

Q. With whom were you seated on that occasion?

A. In the afternoon I was—I think on that afternoon Mr. Darcy was there, the father, and another friend of the family's, and then other members of the family were seated in the same section.

Q. Were you seated with them?

(603) A. Close to them.

Q. You were not seated with Miss Ford on that occasion?

A. Not on Friday afternoon.

Q. Or Friday morning?

A. Or Friday morning.

Q. Did you sit in the same section on each occasion?

A. Close to the same section.

Q. Was it the same row on each occasion?

A. Yes sir.

Q. You are sure of that?

A. I am quite certain of that, sir.

Q. Was Miss Ford in the same row—in the same row with you Friday afternoon or morning?

A. Yes sir. She was in the same row.

Q. You are sure of that?

A. In the afternoon. I am sure.

Q. Are you sure about the morning?

A. No sir, in the morning I don't recall Miss Ford being there in the morning.

Q. Did you know Joe Darcy at that time?

A. The father or the son, sir ——

Q. The man that testified here in Court.

A. Yes, I did.

Q. Was he seated with other members of the family?

A. I don't recall him being there.

Q. You don't recall him being there?

A. No sir.

Q. Now, did I understand you to say that you observed

on Friday afternoon—or on Friday afternoon three or four occasions Judge Boyer conferred with Judge Keller?

A. Yes sir.

(604) Q. Did I understand you to say that was at times when there were objections made by Mr. Achey?

A. I said it was at times when some objections were made by Mr. Achey.

Q. By Mr. Achey?

A. Yes sir.

Q. Do you know how many times Mr. Achey objected on Friday afternoon?

A. I would say perhaps there were three or four objections.

Q. Do I understand on each occasion he objected Judge Boyer conferred with Judge Keller?

A. I would say on perhaps three of those occasions.

Q. And were they all, those objections, made within the one-half hour you say Judge Boyer was on the bench that afternoon?

A. Would you repeat the question ——

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY THE WITNESS:

A. No, I wouldn't say they all were made within the one-half hour, no sir.

BY MR. VAN ARTSDALEN:

Q. You did say Judge Boyer was on the bench for one-half hour?

A. Approximately one-half hour.

Q. Was that from the opening of the session for one-half hour thereafter?

A. I would say it was later in the afternoon—in the afternoon session.

Q. Do I understand then now that Judge Boyer did not come on the (605) bench at the opening of the Friday afternoon session?

A. I do not recall him on the bench at the opening of the Friday afternoon session of Court. I recall him in the courtroom during the afternoon session.

Q. What time?

A. I would say that it was between 2:30 and 3:00 o'clock.

Q. And he was on the bench then for approximately one-half hour?

A. I would say approximately one-half hour.

Q. It was during that period there were three or four objections raised by Mr. Achey?

A. I don't believe I said that. I said there were three or four during the afternoon.

Q. You did say Judge Boyer conferred with Judge Keller on three or four occasions when Mr. Achey made those objections?

A. I don't believe I said it that way. I said there were three or four objections in the afternoon. Then I understood you to ask me how many times they conferred, and I said three or four times, I believe.

Q. You don't know what they were conferring about, do you?

A. No sir.

BY JUDGE MURPHY: You now say, Miss Gordon, you saw Judge Boyer and Judge Keller conferring three different times separate and distinct during that afternoon?

BY THE WITNESS: Yes, Your Honor.

BY JUDGE MURPHY: How far apart were they? Will you give us that—your best judgment? Then go on.

BY THE WITNESS: (606) I would say that they averaged perhaps twenty—one instance twenty minutes, I would say, and perhaps one-half hour there and maybe longer intervals, within that; I would say within less than two hours, Your Honor.

BY JUDGE MURPHY: I will have to clarify. I understood you to say Judge Boyer was on the bench for approximately one-half hour that afternoon?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: Did you see him go on the bench more than once?

BY THE WITNESS: Just the one time.

BY JUDGE MURPHY: Well then, these so-called conferences that you are talking about, or consultations, between the two Judges must have occurred within that one-half hour—would they not?

BY THE WITNESS: I would say two or three occurred within that one-half hour.

BY JUDGE MURPHY: When did they start occurring?

BY THE WITNESS: Are you speaking of objections now ——

BY JUDGE MURPHY: No. I am speaking of these consultations or conferences that you say the two Judges had while they were seated on the bench.

(607) BY MR. VAN ARTSDALEN:

Q. How many times did you actually see them talking to each other?

A. I would say three or four times while he was on the bench. Now with the time element, and I am not too sure about the time element ——

Q. You are not too sure when he came on the bench and when he came off the bench?

A. I am sure it was after 2:00 o'clock.

Q. You are sure he wasn't on there at the opening of the afternoon session?

A. I am not sure of that.

Q. Then, I take it, you are not sure whether he was on the bench more than once that afternoon?

A. To the best of my knowledge, he was on the bench on one occasion that afternoon.

Q. Did you attend the Friday evening session or not?

A. Yes, I did.

Q. Was Judge Boyer on the bench during the Friday evening session?

A. No sir.

Q. Now, were you in Court on Saturday morning?

A. Yes. I was; yes sir.

Q. Was Judge Boyer on the bench Saturday morning?

A. Yes sir.

Q. Do you know whether he left the bench Saturday morning?

A. To the best of my knowledge, he did not leave the bench Saturday morning.

Q. He was there all Saturday morning?

A. To the best of my knowledge.

Q. That is your recollection?

A. That is my recollection, yes sir.

(608) Q. Did you see Judge Boyer on the bench anytime after that, after Saturday morning? How about Saturday afternoon?

A. No, I wasn't in Court Saturday afternoon, sir.

Q. What about Monday morning?

A. Monday morning--Judge Boyer was on the bench Monday morning.

Q. How long—all morning?

A. Not all morning. I think on Monday morning the two Judges were on the bench, as I recall. Then later in the day I recall Judge Boyer left and later in the day ——

Q. What time was it when he left?

A. I would say it was approximately fifteen minutes after Court opened or maybe sooner than that. I just know approximate times.

Q. Was it before or after the trial itself started? When I say "the trial itself started," I mean commenced that morning.

A. I think it was before the trial started that morning.

Q. In other words, he came on the bench but before the trial got under way again he went off the bench, is that correct?

A. That is correct.

Q. Did you see him on the bench at any other time?

A. Yes, he did come back on the bench during the morning session.

Q. How long was he on the bench during that occasion?

A. I would say he was on the bench during that occasion a little less than an hour, as I recall.

Q. What time did he come back?

A. I think it was after recess. I am not quite sure now. I will have to think. Just a moment, sir. I think it was after recess. I am sure it was after recess.

Q. What time was the recess?

(609) A. Well, approximately around 10:00 o'clock. I am not sure of the time on that.

Q. The recess was around 10:00 o'clock?

A. No. Beg your pardon! The recess was around—I am trying to get my mind straightened on two days, between Saturday and Monday. The recess I am not sure about, but I believe the Judge came into the courtroom around—I would say around 10:30.

Q. Around 10:30. How long was he off the bench then?

A. Oh, about one-half hour or so.

Q. What time did Court start that morning?

A. I think around 10.00 o'clock. I am not sure. I am not certain of that.

Q. You say he was on the bench ten or fifteen minutes before the trial got underway?

A. I said I am not sure of the time. It seemed like ten or fifteen minutes. It might have been a matter of seconds before the trial got under way because we got there early.

Q. You say he was off the bench one-half hour, then he come back on and stayed on the bench an hour?

A. I said a little less than an hour, I thought.

Q. That is what day again?

A. That was Monday morning.

Q. That was Monday morning. Now, what about Monday afternoon?

A. No sir.

Q. Did Judge Boyer come on the bench Monday afternoon?

A. No sir.

Q. He did not?

A. No sir.

Q. Were you there at the opening of the session Monday afternoon?

A. Yes, I was, sir.

(610) Q. And when did you first observe Judge Boyer in the courtroom Monday afternoon?

A. To the best of my recollection, it was when I entered the courtroom that he was there.

Q. What time did you enter the courtroom?

A. I think it was a little before 1:30.

Q. Where was Judge Boyer at that time?

A. Judge Boyer was sitting in the chairs reserved for counsel and members of the bar.

Q. Now, Miss Gordon, was there not a passage-way between the chair where Judge Boyer was seated, as you say, and a table, the nearest table?

A. I would say there would be an opening.

Q. Did you see people walk through there?

A. No, I didn't, other than the immediate persons that were concerned.

Q. Yes; but you did see people walk between the chairs, that row of chairs where you say Judge Boyer was seated, and the nearest table?

A. I don't recall, sir.

Q. Is it not a fact that in front of this row of chairs where you say Judge Boyer was sitting, there was a space of several feet and then there was another group of chairs and then beyond that a table?

A. As I recall, they were off to the side of the courtroom. I would have to ——

Q. Now, Madam, referring to this "Exhibit No. 135" ——

A. Yes sir.

Q. —you see the chair that has been marked there "Judge Boyer" you say he was sitting in one of those chairs in that immediate vicinity; is that correct?

A. Yes sir.

(611) Q. One of the chairs in that row?

A. Yes sir.

Q. Is it not a fact that immediately in front of that chair as that chair was facing there was another group of chairs around the table, as is shown in that diagram?

A. I don't believe it was immediately in front. I would say it was across this way more so, not immediately in front. What I was trying to say is it would be back this way more.

BY MR. MARGIOTTI: At that time she pointed to the table that is in the diagram and put it back further toward the bench.

BY JUDGE MURPHY: Miss Gordon, in your judgment, how far was it from where Judge Boyer was sitting to the nearest point of any table in that courtroom, if you know?

BY THE WITNESS: I don't know, Your Honor, in feet. I can just point to the distance here, to the best of my knowledge.

BY MR. VAN ARTSDALEN:

Q. Miss Gordon, was there not in front of the chair where Judge Boyer sat another row of chairs before you came to any table?

A. Not that I recall, sir.

Q. I show you "Relator's Exhibit No. 119," being a picture of the courtroom. Do you recognize that picture?

A. Yes, I do, sir.

Q. All right. Now then, do you see any change in the position of any of the furniture or tables in there from the time you say you were there on Monday afternoon?

A. No sir.

Q. What is that exhibit?

(612) A. "No. 119." Just as I said, the table would be back toward the bench, as I recall it, which it doesn't look that way in this exhibit.

Q. When you say "this exhibit," you are referring to "Exhibit No. 1353"

A. Yes sir.

Q. How about "Exhibit No. 119?"

A. I don't understand the question sir.

Q. Miss Gordon, I asked you whether there was any change observable to you in the position of the furniture at the time that you were at the trial on Monday afternoon from that that is shown on "Relator's Exhibit No. 119," and I believe you said "No sir" ——

BY MR. MARGIOTTI: No ——

BY JUDGE MURPHY: What is the answer?

BY MR. MARGIOTTI: That is better.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY THE WITNESS:

A. No sir, and I believe, just as I said, the table that is shown in this exhibit would be back further, as it would appear in this exhibit.

BY JUDGE MURPHY: Do I understand you to say that that picture you now have in your hand portrays that courtroom as you saw it on that Monday in June 1948?

BY THE WITNESS: (613) To the best of my knowledge, Your Honor, it does portray the location—the outline of the courtroom.

BY JUDGE MURPHY: Does it portray the objects therein?

BY THE WITNESS: To the best of my knowledge, yes sir.

BY JUDGE MURPHY: What is your next question?

BY MR. VAN ARTSDALEN:

Q. You say you did not see Judge Boyer write any note, is that correct?

A. No sir.

Q. You did observe Judge Boyer passing a note to Mr. Biester, is that correct?

A. Yes sir.

Q. How far away were you, please, at that time—approximately?

A. I would approximate perhaps eight or nine feet.

Q. And it is not a fact Mr. Biester and Judge Boyer's backs were to you at that time?

A. I would say sideways, sir. You could see—I could see also the view sideways. It is a little confusing.

Q. Now, Madam, just one other question. On Friday afternoon were these objections that you state were made—were they made before or after the afternoon recess?

A. I don't recall, sir.

BY MR. VAN ARTSDALEN: No further questions.

BY MR. MARGIOTTI: No further questions.

(Witness excused.)

Your Honor, the Relator rests.

(614) BY MR. RYDER: If the Court please, the Commonwealth moves to dismiss the Petition for the reasons asserted in the motion to discharge the rule and the brief in support thereof, and also on the additional ground that the evidence produced during the course of this hearing on behalf of the Relator is insufficient in quality and quantity to establish that the Commonwealth of Pennsylvania is about to deprive the Relator of his life in violation of the due-process clause of the Fourteenth Amendment.

BY JUDGE MURPHY: Ruling reserved. We will hear from the other side.

BY MR. RYDER: May I suggest that since the original application to this Court has not been executed by the Relator himself but by his attorneys ——

BY JUDGE MURPHY: Before the Relator rests—and we ask that the rest be stricken off so that the Court can ask a question. If you don't, we will ask the question nunc pro tunc.

We notice that the defendant, David Darcy, has been in this courtroom from the beginning of this proceeding throughout every session until this moment; and we now direct this question to David Darcy himself, the defendant: Mr. Darcy, is there anything you have to add to what has been said here throughout this proceeding—anything you want to add on your own behalf? You have a right to testify as a witness. You have a right to take the stand, and you have a right to tell this Court anything you think will add light on this proceeding. What is your wish?

BY DAVID DARCY: No, Your Honor.

(615) BY JUDGE MURPHY: You don't desire to add anything to what your lawyers have done and what has happened here in the courtroom?

BY DAVID DARCY: No, Your Honor.

BY JUDGE MURPHY: Do you have confidence in your attorneys that are in Court at the present time?

BY DAVID DARCY: I do, Your Honor.

BY JUDGE MURPHY: Mr. Margiotti, were you at any time throughout this entire proceeding denied the opportunity to talk to your client?

BY MR. MARGIOTTI: I was not.

BY JUDGE MURPHY: Yesterday's paper—one of them—says there was no access permitted, as we understood it.

BY MR. MARGIOTTI: Well, as a matter of fact, I talked to my client when he was in the Marshal's office, and yesterday I talked to him here in the presence of the Marshals, but I didn't care whether they were there or not.

BY JUDGE MURPHY: What I mean is I saw a piece in one paper—I won't say in what city, but, at any rate, there was a piece in the paper that apparently would give the opinion that access was denied to the defendant.

BY MR. MARGIOTTI: That is not true.

BY JUDGE MURPHY: (616) Certainly, this Court

knew nothing about it. We wouldn't stand for anything like that.

BY MR. MARGIOTTI: Of course, not. I know you wouldn't stand for it. It didn't happen, and if that had happened, you would have known about it.

BY JUDGE MURPHY: I think so.

Going on, I want the record to show the defendant has been in Court, he has had access to his counsel, he has confidence in his counsel, and we have that expression, and has been afforded an opportunity to speak if he desires ——

BY MR. MARGIOTTI: The question of taking the stand has been discussed with him by me.

BY JUDGE MURPHY: He has been afforded the opportunity and he has had a discussion with Mr. Margiotti.

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: He has confidence in his counsel and on the record made in Court.

The Court has gone as far as it desires into the inquiry. I am to be exhaustive on that phase.

Now the Relator rests, and if he doesn't, the Court will direct that that phase of it is over for the time being.

BY MR. RYDER: I was going to suggest to the Court it might be judicially expedient since the application to this Court has (617) not been executed by the Relator but by his attorneys, that you inquire of the Relator whether or not he approved of these proceedings.

BY JUDGE MURPHY: Well, we will ask that question.

Mr. Darcy—I know he is not under oath; he is here in Court and we will take his answer. Mr. Darcy, there has been filed in this Court a Petition for a Writ of Habeas Corpus and through that Writ these counsel, Mr. Margiotti and Judge Pannell, are attempting to obtain your discharge from custody. Do you approve of what they are doing?

BY DAVID DARCY: Yes sir, Your Honor.

BY JUDGE MURPHY: And do you approve of that Writ being in process right now?

BY DAVID DARCY: Yes sir, Your Honor.

BY JUDGE MURPHY: All right, I think we have covered that. If we didn't, we would hear in this one pretty quickly. All right, sir.

Let me say this: It is 11:00 o'clock and we have made some progress. Instead of getting you started and then taking a ten-minute recess, we will take a ten-minute recess now and then get started.

(Recess.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

MR. CLARENCE H. DANNENHOWER, called and sworn on behalf of the Respondent, on direct and cross-examination, testified as (618) follows:

DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Where do you live?
A. Doylestown.
Q. What address in Doylestown?
A. Lincoln Avenue.
Q. What is your age?
A. Sixty-nine.
Q. What is your occupation?
A. I am a Court Crier for the Bucks County Courts.
Q. How long have you been a Court Crier for the Bucks County Courts?
A. Three years.
Q. Are you related to me in any way?
A. I am your uncle.
Q. Prior to being Court Crier did you hold any other official position with the Bucks County Courts?
A. I was a tipstaff.
Q. When were you first appointed?
A. April 1941.
Q. Were you a tipstaff from April 1941 continuously on down to the time that you were appointed Court Crier?
A. That is right.
Q. At the time of the trials of Foster-Zietz and of David Darcy what was your position?

A. I was a tipstaff.

Q. Now, Mr. Dannenhower, what, if any, connection did you have with the jury of the case that tried David Darcy?

A. I was appointed tipstaff in charge of the jury.

(619) Q. Will you tell us whether or not you recall the morning of Monday, June 7, 1948?

A. I do.

Q. And when were you appointed as tipstaff in charge of the Darcy jury?

A. As soon as the first juror was accepted by both sides.

Q. Were you sworn in at that time?

A. I was sworn in at that time.

Q. All right. Now, Mr. Dannenhower, will you tell the Court, please what arrangements, if any, you made for the convenience and comfort of the jurors?

A. I engaged the rooms at the Doylestown Inn.

Q. Where is the Doylestown Inn in relation to the Bucks County Courthouse?

A. Why, it is on State Street about one-fourth of a block from Main Street and is about three squares from the courthouse.

Q. Will you tell us, please, how the jury was selected for this case?

A. Why, they were sent to another room—all the panel, other rooms, and were drawn; two names were called at a time. The first one came into the courtroom, the other one was retained outside the courtroom, and they were questioned.

Q. Were the jurors so drawn and called on voir dire individually questioned?

A. Individually questioned.

Q. And were those questions heard by other members of the panel who had not yet been called in?

A. Absolutely not.

Q. Mr. Dannenhower, did you remain in the main courtroom where this case was tried throughout all the proceedings?

(620) A. Only while the jurors were in the room, the jurors that were trying the case.

Q. And were you in the main courtroom on all occasions when any of the jurors who were sworn in this case were in the room?

A. Right.

Q. Now you have testified, I believe, that you made arrangements for the jurors to stay at the Doylestown Inn. Will you tell us, please, what arrangements were made so far as getting clothing and other necessities to the members of the jury?

A. We took them in to another room, the law library, and they communicated their home address and phone number and the tipstaves in charge called those addresses and made arrangements for the clothing to be sent there.

Q. Do I understand then that the communications with the families for clothing were through the tipstaves?

A. Absolutely.

Q. What other tipstaves, if any, were used to take charge of this?

A. Mrs. Gwinner was appointed when the first woman juror ——

Q. Do you recall her first name?

A. No, I don't, at the present moment.

Q. What other tipstaves?

A. She was appointed as soon as the first woman juror was accepted. Gideon Gahman was appointed, I think, next, and then Mrs. Ethel Van Sant.

Q. Do I understand there were four tipstaves?

A. Four tipstaves were in uniform.

Q. Will you tell us, please, where or what you know about Mrs. Gwinner at the present time?

A. Mrs. Gwinner passed on about a month ago.

Q. You mean she died?

A. Yes sir.

(621) Q. Now after a juror was accepted was that juror at any time allowed—strike that. After a juror was selected how did the tipstaff take charge of that juror? Just explain the process.

A. Why, they were taken to another room while the rest of the panel was called—in charge of other tipstaves that were already sworn.

Q. What about the meals?

A. At the meals we had a separate table at the hotel to the rear of the dining room. I was seated at one end, Mrs. Van Sant the other, and the two tipstaves on either side of the table, Mr. Gahman ——

Q. What about the rooms for the jurors at the hotel?

A. They were so situated that my room was on the corner of the main corridor to the entrance to that corridor.

Q. Will you state whether or not you would leave locked your room at night?

A. No, that door was opened at night.

Q. What about the rooms of the jurors, were they locked or not?

A. They were not locked.

Q. Why was that?

A. Fire hazard.

Q. Now, were any newspapers read by any of the members of the jury that tried the Darcy case?

A. No newspapers was seen by a juror.

Q. What precautions, if any, were taken by you to prevent newspapers from getting to any of the jurors?

A. Why, when any of their baggage or bags was addressed to them it was opened either by myself or one of the other tipstaves in their presence and gone through before they were turned over to them.

Q. Gone through for what purpose?

(622) A. To see if there was any newspapers, letters or communications of any kind in it.

Q. What about communications by means of radio?

A. By means of what?

Q. Radio.

A. There was no radio.

Q. Was there any radio in any of the hotel rooms?

A. No.

Q. Were the jurors allowed to listen to any radio programs?

A. Absolutely not.

Q. What about television?

A. No television.

Q. Did any of the jurors see any television shows during the time from the time that they were first accepted as jurors up until the time they were discharged?

A. Absolutely not.

Q. What arrangements were made in the evenings after the sessions of Court closed for the day?

A. Why, the jurors were taken for a walk in company with the four tipstaves.

Q. Were they taken in a body?

A. In a body, never allowed to separate.

Q. At any time throughout the course of that trial were any of the jurors allowed or did any of the jurors speak to any persons whatsoever except tipstaves and other members of the jury?

A. Absolutely not.

Q. What about during the evenings; what was done for the comfort and convenience of the jurors?

A. I had arranged for a private room where we could gather in the evening.

(623) Q. During the course of time from the time that a

juror was accepted up until the time they were dismissed, was there any discussion among any of the jurors you heard relative to this case?

A. Absolutely not.

Q. Mr. Dannenhower, by what means was the jury brought in to the courtroom in the mornings?

A. They were brought in the rear entrance through the corridor, taken to the law library and kept there until they were requested by the Court to come in.

Q. And how was the jury actually brought into the main courtroom?

A. Why, through this back door, side door. They had about ten feet to walk to the first jury chair from that door.

Q. Was the rear—will you state whether the rear corridor was used generally by the public?

A. No, it was not.

Q. Will you state whether or not the public was prohibited from using the rear corridor?

A. They were.

Q. Now, Mr. Dannenhower, I refer you to "Relator's Exhibit No. 135," and ask you to point out the means by which the jury was brought into the courtroom on each occasion.

A. This is the law library ——

Q. Strike that question that I just asked. Was the jury brought in and taken out from the main courtroom by the same means on each occasion?

A. On each occasion.

Q. All right, sir. Will you point out, please, just how the jury was brought in?

A. This is marked "Attorney's Room," and there was another room, the law library, this side of that towards the rear of the court- (624) house.

Q. Which is not shown on "Relator's Exhibit No. 135?"

A. Which is not shown on "Relator's Exhibit No. 135."

It was only a few feet from the rear entrance to the courtroom where we brought the jury in.

Q. Now there appears—will you point out, please, the method by which the jury was brought in?

A. The jury was brought in through where it is marked "Exit."

Q. The place you are pointing to is an opening marked "Exit" to the left of the bench as the Court would sit on the bench, is that correct?

A. That is right.

Q. And from that where were they taken?

A. Directly to their seats.

Q. How far was that from this chair, approximately?

A. It was approximately ten to eleven feet.

Q. All right.

A. The first chair.

Q. Again referring to "Relator's Exhibit No. 135," Mr. Dannenhower, will you state whether that accurately depicts the present situation in the Bucks County Courthouse, Courtroom No. 1?

A. It does.

Q. And what, if any, changes are there—or were there at the time of the trial from that as shown on "Relator's Exhibit No. 135?"

A. The witness stand here; the entrance to that is now changed to what it had been at that time.

Q. Was the witness stand location changed in any way?

A. No. The witness stand location is exactly the same.

Q. Do I understand it is merely the manner of approaching the stand?

A. The manner of the witness who enters the witness stand.

(625) Q. What other changes, if any, do you observe?

A. None, sir.

Q. What about the furniture, sir?

A. The furniture is practically the same. It may have been reupholstered since then.

Q. How many jurors were selected for this case?

A. Twelve jurors, two alternates.

Q. I notice on "Relator's Exhibit No. 135" there are shown what appear to be twelve seats. Where did the alternate jurors sit?

A. The two alternates were seated directly in back of No. 7 and No. 8 jurors.

Q. All right, sir. Is there—or was there a passage-way between the place where the jurors were seated and the row of chairs that are shown on that diagram as being right along the railing that separates the spectators from the main floor of the courtroom?

A. There was.

Q. And how wide was that passage-way?

A. Oh, I would say five to six feet.

Q. During the course of the trial and the selection of the jury where did you sit?

A. I sat to the rear of the jury on the seat on a raised platform where I could overlook all the jurors in the courtroom—right here.

Q. Was that a chair immediately in front of the railing that separates the spectators, benches and witness-spectators, from the main floor of the courtroom?

A. It was.

Q. At any time throughout the trial of the Darcy case will you state whether or not any spectators or witnesses in the courtroom spoke to any of the jurors other than what may have been said on the witness stand?

(626) A. Absolutely not.

Q. Mr. Dannenhower, were you in uniform throughout these proceedings?

A. Yes.

Q. What about the other tipstaves?

A. They were all in uniform.

Q. How many tipstaves were there in the courtroom throughout the trial, do you know?

A. There was one at the main entrance, and on some occasions two. There was one directly across from where the Sheriff sat right here, the end of the aisle ——

Q. You are pointing to a location immediately to the left of the main aisle leading into the courtroom and a chair directly in front of the railing that separates the spectators benches from the main floor of the courtroom?

A. That is correct. That is a raised platform and the chair he is seated on. There was another at the end of this aisle ——

Q. You are pointing to a chair that we have marked "Judge Boyer," is that correct?

A. Yes sir. There was another here ——

Q. You are pointing to a chair immediately to the left of that same aisle, is that correct?

A. That is correct. And there was one at the entrance to the Judge's chambers.

Q. All right. How many tipstaves were there altogether in the courtroom during those proceedings?

A. Nine or ten.

Q. All right. And were they all in uniform?

A. They were all in uniform.

Q. Do you recall whether there were any uniformed policemen in the Court?

(627) A. I think maybe some of the State Police at times were with—were in uniform, but not more than one or two.

Q. Mr. Dannenhower, you have mentioned on various occasions the jury was taken into a room which you have identified as the law library, is that correct?

A. That is right.

Q. What, if any, precautions did you take to isolate the jury in that room?

A. Locked all other doors, entrance to that, and we remained in that room with them, some of the tipstaves.

Q. At any time you were in that room were there any other persons in the room besides tipstaves and the jury?

A. Only those sworn in the case.

Q. Now there is in evidence there a room marked "Attorney's Room" ——

A. Yes.

Q. —is there a door that connects with the "Attorney's Room" ——

A. I locked that door and put the key in my pocket.

Q. —between the "Attorney's Room" and the law library?

A. There is.

Q. And what was done in relation to that door when the jury was in there?

A. I locked that door and put the key in my pocket.

Q. At any time you were in there with the jury did you overhear any conversations that may have taken place in any adjoining rooms or hallways?

A. No.

Q. Is that a solid door?

A. That is a solid door.

Q. So that at—is there any way of seeing through that door?

A. No.

(628) Q. During the course of the trial what was done at recess times?

A. At recess times we retired—you mean if a recess was called in between the Courts ——

Q. When they took a brief recess what was done?

A. A brief recess we took them to that law library.

Q. What was done so far as personal convenience was concerned?

A. Why, we personally conducted them to the washrooms and saw that there was nobody in there and wouldn't permit them to enter if there was anybody in there.

Q. At any time when any of the jurors were in the washrooms was anyone else in there?

A. No sir, we stood outside the door and prevented anybody from going in.

Q. Mr. Dannenhower, throughout the course of that trial were there at any time spectators seated behind you?

A. Yes. Not in the first couple rows.

Q. At any time throughout the course of that trial did any of those spectators make any comments or statements that were overheard by you?

A. No. I couldn't overhear them.

Q. How close were you seated to the nearest juror?

A. I was right in back of the ninth juror with an aisle between.

Q. Mr. Dannenhower, do you know what tipstaff was in charge of the door leading through what is marked on "Relator's Exhibit No. 135" as the corridor—I beg your pardon—marked "Corridor" and then "Entrance Hall?"

A. Howard Clymer.

Q. Do you know where he is?

A. Howard Clymer is deceased.

BY JUDGE MURPHY: (629) Where was he?

BY THE WITNESS: He was stationed at the main entrance door to the courtroom.

BY MR. VAN ARTSDALEN:

Q. Mr. Dannenhower, throughout the course of the Darcy

trial did you see or observe at any time any disturbances in the courtroom?

A. I did not.

Q. Do you recall of any occasion—will you state whether you recall of any occasion the Court cleared the courtroom?

A. It was never done.

Q. Do you recall whether on any occasion order was called by the Court or the Court Crier?

A. I recall no such instance.

Q. Incidentally, do you know who was the Court Crier during this?

A. Walter Scott.

Q. Where is he at the present time?

A. Walter Scott is deceased.

Q. What can you tell us, Mr. Dannenhower, as to the number of spectators that were seated in the courtroom throughout this trial?

A. I don't think at any time there was more than 300; most times not over 200.

Q. Do you know how many people can be seated in the courtroom?

A. Approximately 500.

Q. Mr. Dannenhower, there has been testimony regarding certain magazines that were observed in the courtroom, specifically copies of a magazine, "Relator's Exhibit No. 136." Did you observe any such magazines in the courtroom?

A. I did not.

(630) Q. You have stated that you were seated on a particular chair, is that correct?

A. That is correct.

Q. Will you describe that chair just a little more fully, please?

A. That chair is on a platform just about the height of this.

Q. How high would you say that it?

A. Why, that is a little better than one foot, I think.

Q. All right. Were you in a position where you could observe the courtroom?

A. I could overlook the courtroom.

Q. And did you observe around in the courtroom throughout the course of this trial?

A. I did.

Q. Do you recall whether Judge Boyer on any occasion sat on the bench?

A. He came into the opening in the morning sometimes; not every morning, I don't believe.

Q. Mr. Dannenhower, would the jury come in and take its seat in the box before or after Court convened?

A. Usually after Court convened.

Q. And how would you know when to bring them into the Court?

A. I was notified by the Court to bring them in.

Q. At any time throughout the course of that trial was the jury taken through the main corridor of the courtroom?

A. Never.

Q. At any time throughout the course of that trial was the jury taken through any groups of people or crowds of people?

A. Never.

Q. At any time throughout the course of that trial did you overhear any conversations relative to this case?

A. I did not.

(631) Q. Now you have stated, I believe, that the jurors were on occasions taken for walks around town. Will you describe those a little more fully to the Court?

A. Well, usually I was up front with them, Mrs. Van Sant with the ladies and Mr. Gahman and Mrs. Gwinner

with the body on either side and we walked. In the morning we took a walk before we came over to the courtroom. We took one in the evening before dinner.

Q. What, if anything, did you observe as to other persons besides the jury around on the streets of Doylestown?

A. Very few other people on the streets.

Q. You were present at the time that the verdict was brought in?

A. I was.

Q. Do you recall whether there was any display of any emotions by any of the spectators?

A. I saw no such display.

Q. And did any of the spectators communicate with any of the jurors right after the jury had been dismissed?

A. They did not.

Q. Mr. Dannenhower, did you observe anything unusual take place Friday evening in the Friday evening session?

A. No. I did not.

Q. Do you recall during the Friday evening session where Mr. Biester was located?

A. Mr. Biester was at the defense table.

Q. Was he there throughout the course of that session that evening?

A. I believe so.

Q. You said "defense table," sir.

A. I meant District Attorney's table.

Q. Mr. Dannenhower, will you point out on "Relator's Exhibit No. 135" where you were seated again?

A. Right here. The first aisle going off facing ——

(632) Q. You are pointing or indicating a chair immediately in front of the railing that separates the main floor of the courtroom from the spectators' benches and to the right of the first aisle on the right as one enters the courtroom, is that correct?

A. That is right.

Q. And from that position did you have a complete view of the courtroom?

A. I did.

Q. Mr. Dannenhower, were you present throughout the charge of the Court?

A. I was.

Q. There has been—you have been here in Court throughout these proceedings, is that correct?

A. I have.

Q. And there has been testimony relative to a note-passing incident. Did you observe anything in relation to that?

A. I saw no note passed.

Q. In reference to the meals the jurors had, were there other persons allowed to eat in the dining room during that period of time?

A. In the dining room —

Q. Yes.

A. Yes, at other tables.

Q. And how close was the nearest table to any of the jurors' table where any persons other than the jury and tipstaves ate?

A. Why, the nearest table, I should judge, would be the front end of the bench.

Q. Can you give us an estimate in feet?

A. Oh, about eight feet.

Q. And at any time did you overhear any conversation at any of the (633) other tables?

A. I did not.

Q. Mr. Dannenhower, I want to refer to some of these photographs, please. Will you look at "Relator's Exhibits Nos. 118, 119, 120, and 121," please, and tell us whether they accurately depict the conditions presently existing in the Bucks County Courthouse?

A. They do.

Q. There has been some testimony in relation to the location of certain tables. Will you tell us, please, whether these exhibits accurately depict the location of the tables at the time of the Darcy trial?

BY MR. MARGIOTTI: We object, leading. We object to it.

BY JUDGE MURPHY: Reframe your question.

BY MR. VAN ARTSDALEN:

Q. Will you state, sir, whether there are any changes that were present at the time of the Darcy trial that are not shown ——

BY MR. MARGIOTTI: I might just as well have left it go.

BY JUDGE MURPHY: Yes; we will permit that one. Were there any changes now from then. We will permit it.

BY MR. VAN ARTSDALEN: —on those exhibits?

BY THE WITNESS:

A. Why, there are three Judges' chairs there while at the Darcy (634) trial there was only two.

BY MR VAN ARTSDALEN:

Q. Any other changes?

A. There was a change, as I said, in the witness' entrance

to the witness stand, and everything else appears to be the same to me aside from that. Two of those chairs were re-upholstered since then.

Q. All right. Do you know—strike that. At what time did the jury retire in the evenings to their rooms?

A. Why, we usually gathered in that room that was reserved for the jurors and I think 11:00 o'clock was the latest we left it.

Q. Did all the jurors and tipstaves retire at the same time?

A. Yes. The tipstaves usually waited until after the jury had retired.

Q. Will you state at any time after the jurors retired you observed any of the jurors leave their rooms?

A. I observed none of them did leave the room.

BY MR. VAN ARTSDALEN: You may cross-examine.

CROSS-EXAMINATION.

BY MR. MARGIOTTI:

Q. Are you related to Judge Dannenhower of Montgomery County?

A. Distantly, yes.

Q. I see. Now you have stated that there were nine or ten tipstaves?

A. Yes sir.

Q. And is that the usual number that you have there in that Court?

A. I think we put only one extra one on at that time.

Q. During the Darcy trial?

(635) A. That is right.

Where did you place him?

A. It wasn't a him. It was Mrs. Gwinner.

Q. That was the one who is unfortunately dead?

A. That is right.

Q. I understood you to say that the jurors in their selection were in a room when they were called out for their voir dire examination is that right?

A. That is correct.

Q. And when a juror—and they were called one by one?

A. Correct.

Q. And when a juror was called and he was accepted by both sides did he take his place in the jury box?

A. Just for a brief time.

Q. What do you mean by "a brief time?"

A. Well, maybe a few minutes.

Q. What do you mean by "a few minutes?"

A. Three or four.

Q. Three or four minutes. And did that apply to every juror who was called and actually selected until there was a complete selection of all jurors including the alternates?

A. I think the first two remained until the third juror was called.

Q. I see.

A. That is my recollection.

Q. That is your recollection?

A. Yes sir.

Q. So that we get this clear, Juror No. 1 was accepted by both sides?

A. Correct.

Q. And he would take his place in the jury chair?

(636) A. Yes sir.

Q. And I don't know whether—which is No. 1?

A. The one closest to the witness stand.

Q. And in front?

A. And in front.

Q. And the one going toward the back?

A. No. 6.

Q. Which is No. 7?

A. No. 7 would be the first one in the second row.

Q. Back of No. 1?

A. Right back of No. 1.

Q. Now your recollection is that No. 1 and No. 2 were called and selected?

A. Correct.

Q. How about No. 3?

A. When No. 3 was called and selected, the two seated previously just sat down, and the Court instructed us to take those three jurors to the law library.

Q. To the law library. How do you know there were only three selected at that time?

A. Well, that is my recollection, Mr. Margiotti.

Q. Do you have anything else by which you can determine that except your recollection?

A. None whatever.

Q. It could have been the fourth or fifth?

A. I doubt that.

Q. It could have been more than three?

A. My recollection is three. It might have been more.

Q. It might have been more. Do you remember particularly a juror (637) being called, a prospective juror, who was examined on his voir dire, who made—do you remember a juror—I will give you his name—Harry T. Westlake; do you know him personally?

A. I do not, no.

Q. Well, do you have any independent recollection of his being examined under oath?

A. No, I do not.

Q. Do you have any independent recollection of his having said in answer to a question:

"Well, I think—yes, I have. It is one of the most cold-blooded murders I ever heard of?"

A. No, I have no such recollection.

Q. Do you recall what, if anything, the Court said to the other jurors who had been selected at that time? Would that refresh your memory?

A. Possibly, I don't know.

Q. Well, I am going to show you the record only for that purpose on Page 97. Just read this and see if it refreshes your memory.

A. I haven't looked at any of the notes.

Q. I appreciate that. But just look at that. Does that refresh your memory, that Page 79 of the testimony—Page 97?

A. I can't say that it does, Mr. Margiotti.

Q. Well, let me ask you then directly. Isn't it a fact that the Court said to the jurors:

"Yes. The jurors already selected will totally disregard that remark or answer by this juror?"

A. I heard something to that effect, yes.

Q. Well, if you heard something to that effect, isn't it a fact that at that time three jurors had already been selected and were (638) seated in their places.

A. I said that before.

Q. You said "two".

A. And the third one, yes.

Q. Then there were three in their places and heard that remark?

A. I think they did, sir.

Q. And the Judge then proceeded to tell them to disregard the remarks?

A. That is correct.

Q. Now then, was it after that that you took the jurors away to some other room?

A. That is correct.

Q. Now at this time will you tell me how many jurors

had already been selected—at the time you first took them away to some other room?

A. I still think it was three.

Q. Had been selected?

A. Yes.

Q. All right. And they sat there listening to the questions that were propounded to the jurors on their voir dire examination and the answers that were being made?

A. That is right.

Q. And then the three were taken to what room?

A. To the law library which we used.

Q. Which you already pointed out on the map?

A. That is right.

Q. When did you take the next batch up there?

A. Why, they were taken out after each one was selected, it is my recollection.

Q. From that time as each one was selected you took them to the (639) library?

A. Yes sir.

Q. Did that include the two alternates?

A. The two alternates ——

Q. Yes.

A. Yes.

Q. When these jurors after being selected—strike. Now you said that—strike that. You say you were a tipstaff in charge of the jury?

A. Correct.

Q. Who was the principal person in charge of the jury; who was the chief of the tipstaves?

A. I had that jury in charge from the beginning.

Q. You had that jury in charge. And you have testified that no person was permitted to visit or contact any of the jurors?

A. That is correct.

Q. While they were under your care, is that right?

A. That is correct.

Q. Do you know a Mrs. Anna L. Reed?

A. Who?

Q. Anna L. Reed. She was one of the jurors.

A. I recall the name. There was a Reed on the jury, I think.

Q. Do you know Squire Reed, her husband, a Justice of the Peace?

A. No, I do not.

Q. From Penns Park?

A. No, I do not.

Q. Do you know or have you any knowledge Squire Reed got into to see and converse with his wife after the jury had been selected and while it was performing its duty as a jury in the Darcy case?

(640) A. No.

Q. Did you see Squire Reed around there?

A. I did not.

BY JUDGE MURPHY: May we ask counsel if he is now reading from one of the prohibited affidavits?

BY MR. MARGIOTTI: No, Your Honor. I have some information from a source which I didn't think reliable; otherwise I wouldn't have asked the question.

Q. Now in this hotel you say the jurors stayed at, the nearest table was about eight feet from the jurors, is that right?

A. It was a distance of about eight feet, yes.

Q. How close were you to that nearest table—you yourself?

A. Approximately eight feet. I sat at the end of the table.

Q. Was that dining room usually filled?

A. Usually, yes.

Q. Do you know how many people that dining room accommodates?

A. No, I wouldn't know.

Q. Well, could you give us some estimate of the number that it accommodated outside of the jury at that time?

A. Well, if you mean the main dining room ——

Q. I mean the room in which the jury was being fed.

A. About fifty or sixty people.

Q. And was there a lobby at this Doylestown Inn?

A. Yes.

Q. And how big was that lobby?

A. It was rather narrow.

Q. It was rather narrow?

A. Yes.

(641) Q. And do you know that in that Doylestown Inn there was a newsstand?

A. No.

Q. Did you see a newsstand in the Doylestown Inn?

A. No.

Q. Did you observe any newspapers around the chairs or anyplace in the lobby of the hotel?

A. There could have been. I didn't notice them.

Q. Well, if the headlines were large enough and the person's sight was strong enough to see it, would it depend on the size of the headlines—by looking over, they could see the headlines if they existed?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: If he is asking a witness to speculate, we will let him speculate. If the headlines were big enough, the eyes good enough, if you looked could you see? The answer would have to be yes.

BY MR. MARGIOTTI:

Q. Is that right?

BY JUDGE WATSON: If everything would be all right, it would be all right.

BY MR. MARGIOTTI: If everything would be all wrong, it would be all wrong too.

BY THE WITNESS:

A. I noticed no newspapers when I came through.

BY MR. MARGIOTTI:

(642) Q. That isn't what I asked you. You didn't see it. Did you look for newspapers as you came through that lobby everyday?

A. I looked to see that the jurors didn't get a chance to look at any.

Q. How did you look to see that the jurors didn't get a chance to look at any?

A. We kept them away from anyplace where there was newspapers.

Q. Isn't there a stand where they sell the Doylestown Daily Intelligencer and other newspapers ——

A. No.

Q. —in the Doylestown Inn?

A. No.

Q. Wasn't there at that time?

A. No.

Q. In the dining room—were there people reading newspapers in the dining room?

A. There could have been.

Q. Did you observe them how they held them, whether they read them down in their lap or whether they held them up in this manner, or how?

BY MR. VAN ARTSDALEN: I object. The witness has answered "There could have been." He did not answer he saw any.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Did you observe any person reading a newspaper in that dining room—yes or no, first?

A. I don't recall.

Q. Did you look to ascertain whether anybody was reading newspapers (643) in the vicinity of the jury?

A. There was none reading newspapers in the vicinity of the jury.

BY MR. MARGIOTTI: We ask the answer be stricken out and just answer my question: it wasn't responsive.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY THE WITNESS:

A. I did.

BY MR. MARGIOTTI:

Q. Where did you look?

A. To my right.

Q. To your right. Where else did you look?

A. I could see if I looked to my right, all the tables close.

Q. Yes sir. Did you look to your left any time?

A. The left—I was seated at the end of the table. It was a long table down this way. I was seated at this end.

Q. Did you look straight ahead?

A. Yes, straight ahead.

Q. You now say in that dining room you did not see any person reading a newspaper?

A. No, I did not say that.

BY JUDGE MURPHY: He says he saw no one reading a newspaper anywhere near the jury.

BY JUDGE WATSON: He said nobody was reading.

BY MR. MARGIOTTI: (644) He said "There could have been," which is a sort of half answer.

BY JUDGE MURPHY: All right, thus far he has said there was nobody close to the jury.

BY MR. MARGIOTTI: I can ask, Your Honor, other people were reading papers where the jurors had to pass, and that is what I want to find out.

BY JUDGE MURPHY: You ask. He is your witness.

BY MR. MARGIOTTI: He isn't.

BY JUDGE MURPHY: He is your witness for cross-examination. We want clear answers.

BY MR. MARGIOTTI.

Q. Will you tell me whether or not you observed anybody in that dining room looking at newspapers or had papers?

A. That I couldn't answer. I don't know.

Q. In the courtroom you said you did not see a magazine like this?

A. That is correct.

Q. What was that?

A. That is correct.

Q. You wouldn't say there weren't magazines like this in the hands ——.

A. I saw none.

Q. And if—have you discussed your testimony before coming to Court?

(645) A. No.

Q. With no one?

A. I may have spoken about the case but only ——

Q. I am only asking ——

BY JUDGE MURPHY: Let him answer.

BY MR. MARGIOTTI: I thought he had finished.

BY THE WITNESS: I may have spoken to the other tipstaves but I spoke to no one else.

BY MR. MARGIOTTI:

Q. No one else. But you may have spoken to the other tipstaves, is that right?

A. Yes sir. Not as to what I was going to testify to.

Q. The position you have occupied you have already indicated in that courtroom back ——

A. Of the jury.

Q. Back of the jury which would be back of Juror 14 approximately, is that right—back of the second alternate?

A. Yes.

Q. Is that correct?

A. That is correct.

Q. Now at that time was there—did the District Attorney have more than two tables?

A. The District Attorney had one table.

Q. Do you know whether there were three tables there?

A. There was three tables.

Q. I mean the District Attorney was using.

A. The District Attorney was not—only had the one table.

Q. Do you know where the press table was?

(646) A. Oh, yes.

Q. Do you see what would be the press table on "Relator's Exhibit No. 135?"

A. The press table is to the right of the bench, situated at the bench.

Q. Where it is on the photostat?

A. Right where it is on the diagram.

Q. Was it there at the time of the Darcy trial?

A. It was.

Q. Didn't the Commonwealth use three tables and use two of them for exhibits?

A. There has never been more than three tables on the floor of the courtroom.

Q. I am talking about this particular trial. Didn't the Commonwealth use three tables and use two of them for exhibits?

A. Absolutely not.

Q. You mean to say then from the position that you occupied, as you have already indicated, that you could see all over the courtroom?

A. Practically.

Q. And did you look all over the courtroom practically at one time?

A. At different times.

Q. At different times. While you were looking at one corner of the courtroom something could have gone on in another corner without you observing it?

A. I am there to observe.

Q. What is that?

A. I am there to observe.

(647) Q. Suppose you were looking in one corner of the courtroom and something was going on in the other corner of the courtroom could you see it?

A. If I turned to look that way, yes.

Q. Yes, if you turned to look. Now then, the chairs that were occupied by the two Judges, which you say. Are they the two high chairs shown in "Exhibit No. 118?"

A. They are.

Q. What became of the middle chair?

A. That middle chair was not in existence then.

Q. Who appointed you tipstaff?

A. Who appointed me in charge of this jury—President Judge Hiram Keller.

Q. Who appointed you in charge of the Darey jury—did you have charge of the Zietz-Foster jury too?

A. No, I did not.

Q. What were the police officers doing there?

A. Some of them were there as witnesses. State Police you are referring to ——

Q. Any police officers.

A. Some of them were there as witnesses.

Q. And some were there for any other purpose?

A. To see—to guard the prisoners, I suppose.

Q. Were there any other police officers there for some other purpose?

A. None that I know of.

Q. Were there any there to maintain peace?

A. No.

BY JUDGE MURPHY: Were the other defendants present during the Darcy (648) trial, according to the transcript, Mr. Van Artsdalen? Were Zietz and Foster and Capone in the courtroom?

BY MR. VAN ARTSDALEN: I don't believe the record so indicates. It isn't my personal recollection.

BY JUDGE MURPHY: They did not appear as witnesses, is that it?

BY MR. VAN ARTSDALEN: No, they were not witnesses. I am quite sure about that.

BY JUDGE MURPHY: Go ahead, Mr. Margiotti.

BY MR. MARGIOTTI:

Q. Now you said you saw Judge Boyer come in in the opening in the morning?

A. Correct.

Q. Sometime you saw him come in and sometime you say he did not come in, is that correct?

A. Correct.

Q. Do you remember how many times you saw Judge Boyer come in for the opening during the Darcy trial?

A. I think every morning with the exception of Saturday morning.

Q. Will you tell me, if you remember, how long he remained on the bench?

A. Only while papers were presented, to my knowledge.
Q. Do you know of any papers being presented by any wyer?
A. Oh, yes. There was petitions handed up in the morn-g.
Q. By whom?
A. Different attorneys. I couldn't name them after six ars.
(649) Q. Can you name one?
A. That I saw a petition handed up by ——
Q. One lawyer that presented a petition any morning.
A. No,
Q. Did you make any record as to when the Judge would ave the bench?
A. No, I made no records.
Q. You are testifying from recollection now?
A. Absolutely.
Q. Now the District Attorney has asked you about hether you observed any note-passing, between Judge oyer and Mr. Biester, and I think you said you did not bserve any such thing; is that right?
A. I saw no note passed.
Q. You don't say that you were looking in that direction?
A. I was facing in that direction.
Q. Do you know whether you were looking at Judge iester?
A. Judge Biester ——
Q. He was District Attorney then.
A. Yes.
Q. When did you start looking at him?
A. I was looking at him most of the time during the trial. faced him.
Q. Did you see Judge Boyer there?
A. He was occasionally in the courtroom.

Q. Well, at the time you were looking at Biester where was Judge Boyer?

A. Judge Boyer ——

BY MR. VAN ARTSDALEN: I object.

(650) BY JUDGE MURPHY: That can call for 140 answers, and we think it ought to be clarified. The witness has said he was looking at District Attorney most of the time during the trial which lasted seven or eight days. The question is at that time where was Judge Boyer, if you know? We think it is unintelligible.

BY MR. MARGIOTTI:

Q. Do you know when it is charged in this case when the note was passed? You answered the District Attorney. What day was that charged as?

BY JUDGE MURPHY: The witness has said he saw no note-passing.

BY MR. MARGIOTTI: At what day?

BY JUDGE MURPHY: At any time.

BY THE WITNESS:

A. You mean at any time during the charge of the Court ——

BY MR. MARGIOTTI:

Q. I am asking you if you know what is the charge of

the Relator here with reference to the note passing through —or passing—makes no difference. What is the charge?

BY JUDGE WATSON: What do you mean "the charge" —the charge contended?

BY MR. MARGIOTTI: Right.

BY JUDGE WATSON: I thought there was some charge made in the Petition or something. Is there such a thing?

BY MR. MARGIOTTI: There is such a thing in the Petition and in the Opinion (651) of the Circuit Court too.

BY JUDGE WATSON: I didn't know it.

BY MR. MARGIOTTI: I will call it to your attention.

Q. Do you know when it is contended by the Petition that the note was passed, what day?

A. What day ——

Q. Yes.

A. The 14th of June.

Q. How did you find that out?

A. How did I find that out—I heard it.

Q. In the Court?

A. Yes.

Q. Where was Mr. Biester when the charge was being delivered, the charge of the Court?

A. I think he sat at the District Attorney's table.

Q. You think he sat at the District Attorney's table; do you know?

A. He may have gone over occasionally and sat down at the attorney's table or chairs where the attorneys sit. He often does that.

Q. He often does that?

A. Or did.

Q. Do you know whether he did on this case at any time?

A. At times he did sit himself in one of the chairs.

Q. Now during the charge of the Court do you know where Judge Boyer was while Judge Keller was delivering the charge?

A. No, I do not.

Q. Do you remember seeing Judge Boyer?

A. That particular time ——

Q. Yes.

(652) A. No.

Q. Do you remember where Mr. Biester was when the Judge said, "Have counsel on either side anything to suggest to the Court?" or words to that effect, almost the close of his charge?

A. To the best of my knowledge, he was seated at the District Attorney's table.

Q. All right; did you hear Mr. Achey say anything?

A. I don't recall.

Q. Did you hear Biester say anything?

A. I don't recall.

Q. Did you see Mr. Biester go to the bench or approach the table in front of the bench shortly after the Judge had made that remark, not immediately—but after having continued with his charge?

A. I have no recollection of that.

Q. You were looking in that direction?

A. Yes sir.

Q. You missed it! Whatever it was you missed?

A. It is six years ago, Mr. Margiotti ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: There is no jury here. We understand the English language. There is no jury here.

BY MR. MARGIOTTI:

Q. What were you going to say about "six years"?
A. I said this happened over six years ago.
Q. What happened?
A. I said I had no recollection of it.
(653) Q. Then it could have occurred without your remembering it?
A. That could be.
Q. Are you still a tipstaff?
A. No sir.
Q. What is your position now?
A. Court Crier.
Q. Do you at the present time have any feeling against this Petitioner?
A. I have no feeling either way ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: If a man has an interest here besides work—we will take it. It is one of the means of testing credibility of every witness in this courtroom, sir.

BY MR. VAN ARTSDALEN: I will withdraw the objection.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY MR. MARGIOTTI:

Q. Have you expressed any feeling either way?

A. No.

Q. To no one?

A. To no one.

Q. Mr. Dannenhower, when were you appointed tipstaff?

A. 1941.

Q. And do you know when Mrs. Gwinner was appointed, the lady who died?

A. She was only appointed for that case.

Q. Which case?

(654) A. The Darcy case, I believe. She had served before off and on.

Q. Was she a tipstaff during the Foster-Zietz trial?

A. That I don't recall.

Q. Do you know how many tipstaves there were on the Darcy trial that had acted on the Foster-Zietz trial?

A. Two, I think.

Q. Who were the two?

A. Mr. Gahman and Mrs. Van Sant, I think. That is my best recollection.

BY MR. MARGIOTTI: If the Court please, may I call Your Honor's attention to "Relator's Exhibit No. 1" that "Jessie Gwinner was sworn to attend the jurors during the trials and deliberations in this case."

BY JUDGE MURPHY: There is no doubt about it. She was sworn as soon as they picked the first woman juror.

BY MR. MARGIOTTI: This woman was selected in the Foster-Zietz trial.

BY JUDGE MURPHY: I don't know anything about that.

BY MR. MARGIOTTI: I am calling that to Your Honor's attention as being in the exhibit.

BY JUDGE MURPHY: You are calling the Court's attention to "Relator's Exhibit No. ——

BY MR. MARGIOTTI: "No. 1."

BY JUDGE MURPHY: (655) And at page ——

BY MR. MARGIOTTI: I would say it is Page 340.

BY JUDGE MURPHY: And at Page 340 of that exhibit you say that Mrs. Gwinner was also a tipstaff in the Foster-Zietz trial?

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: So that if she was a tipstaff at that trial, then there would be three from the Foster-Zietz trial appointed to the Darcy trial?

BY THE WITNESS: That is possible. There may have been only two.

BY MR. MARGIOTTI:

Q. What is that?

A. There may have been only two.

Q. Why do you say "There may have been only two?" I thought you mentioned two and then I have given you Gwinner.

A. Either Mrs. Gwinner may have served with Mr. Gahman and not Mrs. Van Sant on that.

Q. I see. You are not sure about Mrs. Van Sant?

A. I am not sure about Mrs. Van Sant serving on that

BY MR. VAN ARTSDALEN: She is here and will be called.

BY JUDGE MURPHY: We will have none of that. Let Mr. Margiotti conduct his examination. Never mind volunteering. Let's get on with this case.

BY MR. MARGIOTTI: (656) I think the Court is right, but I don't mind him giving me some additional information on the side.

BY JUDGE MURPHY: We will have no more aside; let's get on.

BY MR. MARGIOTTI: That is all, Your Honor.

BY MR. VAN ARTSDALEN: That is all.

BY JUDGE MURPHY: Sir, I just want to get one thing—your best recollection. As I understand it, you say that during the Darcy trial there were only three tables on the floor of the courtroom?

BY THE WITNESS: Absolutely.

BY JUDGE MURPHY: Some of the other witnesses say there were six tables—or five or six. You say there were only three?

BY THE WITNESS: There has never been over three in the last thirteen years.

BY JUDGE MURPHY: That is all.

(Witness excused.)

MRS. ETHEL M. VAN SANT, called and sworn on behalf of the Respondent, on direct and cross-examination, testified as follows:

DIREST EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mrs. Van Sant, where do you live?

A. I live in Hulmville in Bucks County.

(657) Q. You are married?

A. Yes sir.

Q. What is your age?

A. I am fifty-three.

Q. What is your present occupation?

A. Tipstaff in the Bucks County Court.

Q. How long have you been tipstaff in the Bucks County Court?

A. I was appointed tipstaff just prior to the Foster-Zietz trial.

Q. Have you been regularly so employed ever since?

A. Yes sir.

Q. Were you one of the tipstaves in charge of the Foster-Zietz jury?

A. Yes sir.

Q. Were you one of the tipstaves in charge of the jury of the David Darcy case?

A. Yes sir.

Q. Do you recall when you were sworn as a tipstaff to assist in the charge of the Darcy jury?

A. My recollection is that it was approximately the second day. My duties were with the jurors prior to their questioning but after the second day, I think it was, I was sworn in.

BY JUDGE MURPHY: Mrs. Van Sant, you have been around the courthouse long enough to know the Judge has to hear.

BY THE WITNESS: I was afraid to talk too loud.

BY JUDGE MURPHY: Read the question and answer, Mr. Reporter.

(Question and answer read by the Reporter.)

(658) BY MR. VAN ARTSDALEN:

Q. Will you explain a little more fully what your duties were prior to being sworn as one of the tipstaves in charge of the Darcy case?

A. At that time our jury room was on the second floor to the rear of the courtroom. When they came in in the morning the panel was instructed to go to those two rooms —another room adjoining. Other tipstaves and a Deputy was sent up there, it is my recollection, and as their numbers were called I went to the ladies and gave the number and then they were brought downstairs.

Q. Were there separate rooms for the men and ladies upstairs?

A. There was an adjoining room to the ladies' jury room where it is my recollection the men went in there, and the women went in the women's jury room.

Q. Were you or were you not present in the main courtroom during the calling of the jurors on voir dire?

A. No sir; I heard no questioning whatever.

Q. All right. Now after you were sworn as one of the tipstaves in charge of the Darcy jury will you tell the Court, please, just what your duties were and just what you did?

A. My duty with Mrs. Gwinner, who was sworn before me, was to see to the comfort of the jurors, to apply to their needs as they came up. If they needed anything from home, we made the telephone calls to their home.

Q. Will you explain that procedure a little more fully?

A. They were given a paper to write on their needs as they came up. If they needed clean clothing they would write down what they wanted, where they were at home, so that whoever was at home could find those things at home for them, and it was given over the telephone by Mrs. Gwinner or myself to whoever was at (659) home to bring them in.

Q. How were these delivered to the jury?

A. They were brought down and left at the lobby at the hotel.

Q. Was any inspection made by you or any of the tipstaves?

A. Either Mrs. Gwinner or myself would go over the things as they were brought in.

Q. Mrs. Van Sant, will you tell me, please, what arrangements were made for feeding the jury?

BY JUDGE MURPHY: That is when we think of feeding ourselves. It is 12:30. We will recess until 2:00 o'clock.

(Recess.)

Vol. III

TRANSCRIPT OF RECORD

(Pages 677 to 942)

Supreme Court of the United States

OCTOBER TERM, 1955

No. 323

UNITED STATES OF AMERICA, EX REL. DAVID DARCY, PETITIONER,

vs.

EARL D. HANDY, WARDEN OF BUCKS COUNTY PRISON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 15, 1955

CERTIORARI GRANTED OCTOBER 24, 1955

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Volume III

(Court resumes on Thursday at 2:05 P. M. with all parties, including the Relator, David Darcy, present in Court.)

MRS. ETHEL M. VAN SANT, recalled.

DIRECT EXAMINATION (Continued)

BY MR. VAN ARTSDALEN:

Q. Mrs. Van Sant, I believe before the recess I asked you about the means by which the jury was fed. Will you explain that, please?

A. There was a long table at the end of the dining room, seated all of the jurors and the four tipstaves.

Q. And where was the dining room?

A. As you went in the lobby you turned to your right.

Q. The lobby of what?

A. The hotel. You could either enter the dining room by a door directly off the lobby to your right or through another entrance below that.

Q. Were all of the meals that were served to the jury served in that certain dining room?

A. Yes sir.

(660) Q. On all occasions will you state whether or not the jury had that one table?

A. Yes sir.

Q. Were there other tables in the dining room at that time?

A. Yes sir.

Q. Were other persons served meals in the dining room at the same time that the jury was being served?

A. Yes sir.

Q. Where did you sit at the dinner table?

A. I usually sat at the same end of the table from meal to meal.

Q. Which end was that?

A. Well perhaps, would I say the easterly end of the table ——

Q. Can you identify it in any way with the position where Mr. Dannenhower sat?

A. As I recall, it was at the opposite end of the table from Mr. Dannenhower.

Q. How near, if you know, was the nearest table to the one where you were seated?

A. Oh, eight feet, I would say; seven or eight feet.

Q. Did you on any occasion during the meals that were served there overhear any conversation from any of the other tables?

A. No sir.

Q. Do you recall whether on any occasion you saw any newspapers in and about the hotel?

A. No sir.

Q. How about specifically in the dining room?

A. No sir.

Q. Mrs. Van Sant, will you tell us, please, what was done in the evenings for the jury?

A. There was a room allotted to the jury and tipstaves on the (661) second floor where we always met, and there we passed the evening together.

Q. Was any other person allowed in the room except the tipstaves and the jury?

A. No sir.

Q. Were there any other persons allowed in the room except the tipstaves and the jury while the jury was in there?

A. No.

Q. What about the waitresses at the meals, did they engage in any conversation with any of the jurors?

A. No sir. They only gave their individual orders to the maids—waitresses.

Q. What about the rooms where the jurors stayed in the evenings?

A. In what way are you referring to ——

Q. In their particular rooms. What can you tell us about the manner in which the jury stayed in their rooms?

A. When we all decided it was time to go to bed they were then—as I said, Mrs. Gwinner and myself saw that the women jurors went to their rooms, and they themselves locked their own doors. We never locked them in in case of fire.

Q. Were the jurors before retiring given any instructions by the tipstaves?

A. Oh yes. They were told not to leave their rooms.

Q. So far as you know, were those orders carried out?

A. Yes sir.

Q. Where was your room, Mrs. Van Sant?

A. I roomed with one of the jurors.

Q. Which one of the jurors?

A. Virginia Brillman. I believe she was an alternate.

Q. At any time throughout the course of that trial did you talk to any members of the jury or the alternates concerning this (662) case?

A. No sir.

Q. Did you overhear any conversation among any of the jurors or tipstaves concerning this case during its trial?

A. No sir.

Q. Were any directions or orders given in relation thereto?

A. By whom ——

Q. Were any orders given by the tipstaves, so far as conversation about the case?

A. To the jurors you mean ——

Q. Yes.

A. That is right.

Q. What, if any, were those orders?

A. They were not allowed to discuss it in any manner.

Q. Were any directions given as to the reading of newspapers?

A. They were told they were not allowed to have newspapers.

Q. And did any of the jurors have any or see any newspapers during that week that you observed?

A. They did not, sir.

Q. What about radio programs?

A. They didn't have any radios.

Q. Were any radio programs overheard?

A. No sir.

Q. What about television?

A. They didn't see any television at all.

Q. There has been testimony, I believe, as to the jury taking exercise during certain periods. What can you tell the Court about that, please?

A. We took walks usually one-half hour in the morning before we would come into Court and around to the back door into the (663) back entrance, and after our dinner in the evening we would take another short walk.

Q. Will you state whether the walks were always as a group?

A. Oh yes.

Q. Mrs. Van Sant, will you tell us, please, what you observed at any time during the course of that trial on the streets of Doylestown?

A. It was comparatively quiet, so far as the town was concerned.

Q. Did any persons on the street at any time when you and the jury were on the walks attempt to talk to you or any of the jurors?

A. No sir.

Q. Were the jurors at any time taken by or through any crowds of people?

A. No sir.

Q. Did you observe—see or hear any commotions or disturbances outside of the courtroom during that trial?

A. No sir.

Q. How about inside the courtroom?

A. No sir, not to my knowledge.

Q. Mrs. Van Sant, during the course of the trial when the jury was in the courtroom where did you stay?

A. I sat directly in back of the jury. May I use the chart?

Q. Referring to "Relator's Exhibit No. 135," can you show us?

A. This chair here is another chair elevated that Mrs. Gwinner used.

Q. Now you are indicating a chair that is the furthest chair—strike that—is the chair immediately to the left of the entrance marked "Attorney's Room," immediately in front of the railing separating the spectators benches from the main floor of the (664) courtroom, is that correct?

A. Yes sir. That was a raised chair, as described by Mr. Dannenhower. I either sat at times in this one next to Mrs. Gwinner ——

Q. That would be left of Mrs. Gwinner?

A. Yes sir. —or the one on the other side of Mr. Dannenhower.

Q. What do you mean by "the one on the other side of Mr. Dannenhower?

A. This chair here would be to his left.

Q. You are indicating the second chair from the left to

the left of the first aisle on the extreme right as one enters the courtroom and a chair immediately in front of the railing separating the spectators benches from the main floor of the courtroom, is that correct?

A. That is right, sir.

Q. Did you at any time hear any conversations from any spectators seated behind you?

A. No sir.

Q. Will you state whether there were any jurors closer to the place where the witnesses and spectators can remain than were you?

A. No sir.

Q. How close were you to the nearest juror and to the alternates?

A. I say I didn't always sit in the same chair. At times perhaps I was directly behind the alternates, which would be a position opposite the aisle, I would say, four or five feet.

Q. Was there an aisle between you and the alternates?

A. That is correct, sir.

Q. And how wide was that aisle?

A. I would say four or five feet.

Q. And what arrangements were made during the recess of Court for the personal convenience of the lady members of the jury?

(665) A. Either Mrs. Gwinner or myself would conduct them to the ladies' room.

Q. And where was the ladies' room located?

A. At that time it was on the second floor.

Q. Were the jurors, any of the lady jurors, ever allowed in—what did you do before any of the lady jurors were allowed in?

A. We inspected to see that no one else was in there.

Q. And on any occasion were any lady jurors allowed to

go into the ladies' room when there were other persons in there other than tipstaves or other members of the jury?

A. No sir.

Q. And on the occasions when lady jurors went into the ladies' room what, if any, precautions did you take against other persons going in?

A. We always went inside There are two rooms. You would go in and on into the lavatory. We always stayed at the lavatory door to see that no one else entered.

Q. Mrs. Van Sant, do you recall whether on any occasion there were spectators or witnesses seated behind you in the section reserved for witnesses to your rear as you would be seated?

A. I would say spctators would be back there, but I never recall any witnesses back there.

Q. Can you give us any idea as to how many persons—spectators there were in the courtroom on any occasion?

A. It varied. The courtroom was never filled on any occasion.

Q. Mrs. Van Sant, were you in the courtroom on all occasions when the jury was in the courtroom?

A. Yes sir.

Q. During the Darcy trial?

A. Yes sir,

(666) Q. Mrs. Van Sant, do you recall seeing Judge Boyer in the courtroom?

A. I can't be specific as to what times he was in the courtroom. I know he was in the courtroom.

Q. There has been testimony that Judge Boyer was in the courtroom during Friday evening; do you recall that?

A. I have no recollection of that at all.

Q. Do you have any recollection where Mr. Biester was seated Friday evening?

A. No sir.

Q. Now, Mrs. Van Sant, do you recall the charge of the Court, not as to what was said, but do you recall that phase of the case?

A. Yes sir.

Q. Do you recall whether you observed Judge Boyer in the courtroom at that time?

A. I have no recollection of Judge Boyer being in there.

Q. Can you state or do you recall where Mr. Biester was seated during the charge of the Court?

A. No sir; I can not recall.

Q. Mrs. Van Sant, did you observe any spectators in the courtroom at any time throughout the trial or while you were in the Court in relation to the Darcy case, having any magazines in their possession?

A. No sir.

Q. Mrs. Van Sant, to your knowledge, did any persons whatsoever visit or converse with any members of the jury or the alternates at any time of the trial with the exception of the tipstaves, as you have related?

A. No sir.

(667) Q. There has been specific reference to an Anna L. Reed. Do you recall that juror?

A. I remember Mrs. Reed, yes.

Q. Do you know or did you know at that time the husband of Anna L. Reed?

A. No sir.

Q. Are you able to state whether or not the husband of Anna L. Reed visited her at any time throughout that trial?

A. Not to my knowledge, sir.

Q. On what occasions, if any, was Anna L. Reed not in your immediate presence?

A. I don't recall—after all, Mrs. Gwinner and I were both on duty. I don't recall Mrs. Reed being out of my presence, as far as the group is concerned.

Q. What about in the evenings?

A. I know we were all together in the evenings.

Q. What about at the time you retired?

A. As I say, when she went to her room ——

Q. Do you recall whether she roomed with any other person?

A. I can not recall.

Q. Mrs. Van Sant, do you have any recollection of any note being passed by Judge Boyer to Mr. Biester?

A. No sir.

BY MR. MARGIOTTI: I object because he didn't ask her if she noticed anything unusual. It is leading and suggestive.

BY JUDGE MURPHY: Your objection is overruled.

BY MR. VAN ARTSDALEN: That is all.

(668) CROSS-EXAMINATION.

BY MR. MARGIOTTI:

Q. You don't mean to leave the impression that no note was passed, Mrs. Van Sant; you mean you didn't see anything like that?

A. That is correct.

Q. That is what I thought. Now, Mrs. Van Sant, you have testified that you were a tipstaff in the Zietz-Foster trial?

A. Yes sir.

Q. And that you were also a tipstaff in the Darcy trial?

A. Yes sir.

Q. Now, do you know of any other person or persons who

occupied the same position you did during the two trials, a tipstaff in both trials?

A. Yes sir; Mrs. Gwinner.

Q. Is that "Winner" or "Gwinner?"

A. Gwinner.

Q. Any man?

Q. Who?

A. Mr. Gahman.

Q. Mr. Gahman. Anybody else?

A. There were three for the Zietz-Foster. They are the three. Myself, Mrs. Gwinner and Mr. Gahman—four; Mr. Dannenhower, Mr. Gahman, Mrs. Gwinner and myself.

Q. You say four for the trial. You don't mean to leave the impression the same four had been on the Foster-Zietz trial, but only three of those four had been on the Foster-Zietz trial; is that correct?

A. Three were on the Foster-Zietz trial; four were on the Darcy (669) trial.

Q. And of the four that were on the Darcy trial three had been on the Foster-Zietz trial, is that right?

A. Yes sir.

Q. When did you first officially learn that Darcy was to be tried on June 7?

A. I suppose—my recollection is at the conclusion of the Zietz-Foster trial we were notified to come back on Monday morning for the Darcy trial.

Q. And isn't it true that prior to that time the arrangement had been that only Foster-Zietz were to be tried that term and that Darcy was to be tried the following term?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Do you know ——

BY JUDGE MURPHY: She was only a tipstaff.

BY MR. MARGIOTTI:

Q. Do you know, Mrs. Van Sant, whether—you have any knowledge as to whether or not prior to your learning the time that Darcy was to be tried or summoning of the jury whether or not that case was scheduled officially around the courthouse or by any official person that the case would be tried on that date?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: If she saw any notices as to the date of the trial, we (670) will permit her to answer yes or no.

BY THE WITNESS:

A. No sir, I knew of none.

BY MR. MARGIOTTI:

Q. Now, is there a newstand right across from the courthouse?

A. Across from the courthouse ——

Q. Near there.

A. No sir.

Q. Kenny's Newsstand, do you know where that is?

A. Yes sir.

Q. Where is Kenny's Newsstand?

A. It is on State Street opposite the Doylestown Inn.

Q. On the same street the Doylestown Inn is located?

A. Yes sir.

Q. And in taking the jury to the Doylestown Inn would you pass Kenny's Newsstand?

A. No sir.

Q. You would take them on the other side?

A. That is correct, sir.

Q. Do you recall whether at any time you took them past Kenny's Newsstand?

A. I have no recollection of it, sir.

Q. As I understood your testimony for the District Attorney, you place yourself in this chair, or this one, or this one?

A. To the left of Mrs. Gwinner—I never sat in the same chair.

Q. I see. Which chair did you occupy?

A. This is a higher chair. I usually sat to the left of Mrs. Gwinner. I would say most of the time I sat here to the left of Mrs. Gwinner.

Q. So that we get this record straight, as the chairs are located (671) back of the jury, there would be one—which would be the high chair ——

A. That is right.

Q. —two—three—four—five. Which chair did you usually occupy?

A. No. 2.

Q. No. 2. And was that chair on the floor—on the same level, say, as the jury?

A. Yes sir.

Q. So that you would have the jury in front of you?

A. Yes sir.

Q. And you would have—would you have an alternate in front of you too?

A. At an angle.

Q. At an angle. And would you have part of—what I would call—the Clerk's bench in front of you?

A. That would be directly in front of me in clear view—directly in front of me.

Q. So that that bench would be directly in front of you?

A. Yes sir.

Q. I think we understand that now.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

MR. GIDEON S. GAHMAN, called and sworn on behalf of the Respondent, on direct and cross-examination, testified as follows:

DIRECT EXAMINATION

BY MR. VAN ARTSDALEN:

Q. Mr. Gahman, where do you live?

A. I live in Hairton Township, Bucks County.

(672). Q. What is your occupation?

A. A tipstaff of Bucks County Court.

Q. How long have you been a tipstaff of Bucks County Court?

A. Oh, approximately twenty-four years.

Q. Were you one of the tipstaves for the Darcy trial?

A. Yes.

Q. Will you tell us, please, when you were appointed as one of the tipstaves to take charge of the Darcy jury?

A. I was appointed the second day when they started to pick the jury the second day.

Q. Mr. Gahman, I want to refer you to "Relator's Exhibit No. 135." Are you able to interpret or understand that exhibit?

A. Yes sir.

Q. And will you tell us, please, whether that exhibit accurately depicts the conditions presently existing in the Bucks County Courthouse?

A. That is the way it is in the Bucks County Courthouse now.

Q. What, if any changes do you note on "Relator's Exhibit No. 135" from the conditions that existed at the time of the Darcy trial?

A. Well, there is another Judge's chair here and the witness stand was changed, the entrance to the witness stand.

Q. What about the tables that are shown on "Relator's Exhibit No. 135?"

A. They are about the same as they were that time.

Q. Now, Mr. Gahman, what did you do while the jury was being selected for the Darcy trial?

A. Well as soon as the name was called I went out in the hall, got the other juror to come down from the second floor.

(673) Q. And after you were sworn as one of the tipstaves to assist in the charge of the jury will you describe to us briefly what your duties was?

A. Well, we took care of the jurors that were selected.

Q. What arrangements were made as to getting the clothing and necessities to the jury?

A. Well, when the jurors wanted something they made a note and we called up their homes for whatever they wanted.

Q. Did any of the jurors make any telephone calls during the course of the Darcy trial?

A. No.

Q. By what method was the clothing and other necessities delivered to the members of the jury?

A. They were delivered to the tipstaves in charge of the jury and we opened the packags in the presence of the jurors before it was delivered.

Q. Were any newspapers delivered to any of the jurers?

A. No newspapers.

Q. Any magazines?

A. No.

Q. Where did the jury stay during the trial?

A. The Doylestown Inn.

Q. And where did you stay?

A. The Doylestown Inn.

Q. Will you tell us briefly about the arrangements for feeding the jury?

A. Well, at one end of the Doylestown Inn, the dining room, we had a long table.

Q. Was that table—strike that. You state that it was at one end. Can you describe that a little more fully? All right, (674) let me ask you this: Where were other tables located in relation to this table that you have referred to?

A. Well, there was some other tables in the dining room about maybe eight to ten feet from our table where the jury was sitting.

Q. Will you state whether or not this table you ate at was at the far end of the dining room?

A. At the far end of the dining room.

Q. Was it alongside of any wall?

A. Yes, right the side of the wall.

Q. Did you overhear any conversations from any tables, any other tables besides the one at which the jury sat?

A. No.

Q. Where did you sit during the meals, sir?

A. Well, about the middle of the table.

Q. Was your back toward the other tables?

A. My back was towards the other tables.

Q. Did any of the jurors at any time throughout the Darcy trial converse with any other persons other than members of the jury or the tipstaves?

A. No.

Q. How was the jury conducted from the hotel to the courthouse?

A. Well, as a rule, there was one here—two tipstaves at the front and a couple in the back end of them.

Q. How far is the Doylestown Inn from the courthouse?

A. Oh, I would say about two blocks—two and one-half blocks.

Q. During those times did you always go by foot from the courthouse to the Doylestown Inn?

A. Always by foot.

Q. Were any radios delivered to any of the jurors in this trial?

(675) A. No radio.

Q. Were there any radios in the hotel rooms?

A. Not in our rooms.

Q. Will you describe the room where the jury stayed in the evenings before retiring?

A. Well, we had a room up on the second floor, a great big room.

Q. Was there any radio in that room?

A. No radio.

Q. Was there any television in that room?

A. No television.

Q. Was there any television in any of the jurors rooms?

A. No.

Q. Do you know if there were any radios in any of the jurors rooms?

A. No radios.

Q. What about magazines and newspapers?

A. No magazines, no newspapers.

Q. Mr. Gahman, were you in the courtroom on all occasions when the jury was in the courtroom?

A. Yes sir.

Q. Will you tell us, please, what you recall as to the number of spectators that were in the courtroom?

A. Oh, there were a little bit—the courtroom wasn't more than—a little better than one-half full. I would say about 250.

Q. Were you present during the Friday evening session?

A. I was.

Q. Do you recall seeing Judge Boyer at that session?

A. I don't remember.

Q. Where did you sit during the trial of this case?

A. Mr. Dannenhower was sitting right here at this aisle and I was (676) sitting to the left of Mr. Dannenhower.

Q. You would sit to the left of Mr. Dannenhower?

A. Yes.

BY MR. MARGIOTTI: The immediate left—is that the immediate left?

BY MR. VAN ARTSDALEN:

Q. Is that the immediate left, sir?

A. Yes, I would say so.

BY JUDGE MURPHY: Do you know what he means?

BY THE WITNESS: No, there was room for a couple of chairs in between.

BY JUDGE MURPHY: Were there a couple of chairs between you and Mr. Dannenhower? is the question.

BY THE WITNESS: No; no chairs.

BY JUDGE MURPHY: Did you sit right next to him? Did you sit beside him? Your chairs—were they beside each other?

BY THE WITNESS: No.

BY JUDGE MURPHY: Your witness.

BY MR. VAN ARTSDALEN:

Q. You said you did not sit alongside of Mr. Dannenhower, or that you did. Try to clear it up.

A. Mr. Dannenhower was sitting at the aisle. I was sitting maybe three or four feet left of Mr. Dannenhower.

(677) Q. Now did you overhear any conversation by any spectators or persons in the courtroom except the regular Court procedure?

A. No.

Q. At any time was the jury taken through any crowds of people?

A. No.

Q. Did you observe any disturbances in the courtroom during the course of the Darcy trial?

A. No.

Q. Did you see any magazines or newspapers in the courtroom at any time during the Darcy trial?

A. I didn't see any.

Q. Do you recall the portion of the case when the charge wts made by Judge Keller?

A. I remember when the charge was made.

Q. Will you state whether or not Judge Boyer was in the courtroom at that time?

A. I do not remember.

Q. Do you recall where Mr. Biester was seated at the time of the charge of the Court?

A. No, I don't remember.

Q. Were you in any sort of uniform during these proceedings?

A. I was in uniform.

Q. Will you describe just briefly what sort of uniform you were in?

A. I had a blue uniform with "Tipstaff" on the left elbow and we had a badge "Tipstaff."

Q. What other uniformed persons, if any, did you observe in the courtroom during this trial?

A. Not any that I remember.

Q. Were the lady tipstaves also in uniform?

(678) A. I don't believe they were. They had blue suits but no regular uniform.

Q. Are you familiar with Kenny's Newsstand?

A. I am.

Q. Where is that in relation to the Doylestown Inn?

A. That is across the street from the Doylestown Inn.

Q. Do you know whether or not newspapers were kept outside on the pavements during the course of the Darcy trial?

A. I haven't seen any.

Q. By what route would the jury be taken to the courtroom and returned?

A. You mean from the ——

Q. From the courthouse to the Doylestown Inn.

A. We went out the back door of the courthouse.

Q. When you went on State Street did the jury go in a body?

A. Yes.

Q. And on which side of State Street would you walk?

A. On the left side going ——

Q. Would it be on the side on which the Doylestown Inn is located or the side ——

A. Where the Doylestown Inn is located.

Q. Was that true on all occasions?

A. Yes sir.

Q. Did you observe any demonstrations or any groups of persons making any demonstrations on the public streets of Doylestown?

A. I haven't seen any.

Q. Did any persons attempt to speak to any members of the jury during the Darcy trial?

A. No.

Q. Did any members of the jury speak or attempt to speak to any (679) other persons other than the tipstaves or the jurors?

A. No.

Q. Did you know the husband of Anna Reed?

A. No.

BY MR. VAN ARTSDALEN: You may cross-examine.

CROSS-EXAMINATION.

BY MR. MARGIOTTI:

Q. Now, Mr. Gahman, do you remember an occasion when a ballistics expert appeared on the witness stand, an expert on revolvers and so on?

A. No, I don't remember anymore.

Q. Well, do you know that this expert had a lot of paraphernalia and spread it on a table; do you remember that?

A. Yes. They had some stuff there. I remember that.

Q. You remember that?

A. Yes.

Q. Do you remember that was not the same table that the District Attorney and his assistant were occupying; it was the one next to it?

A. To my recollection, it was on the same table.

Q. You think it was the same table?

A. Where the District Attorney was sitting.

Q. All right. I just want to get one position of yours. The position that Mr. Dannenhower occupied, as I understand, was here; I am pointing to it?

A. Yes.

Q. Which is the fifth chair in the front row in front of the railing, is that right?

A. Yes.

(680) Q. Now the position you occupied was to his right —or was it to his left?

A. To my left.

Q. Then it would be to his left as he was seated—as Dannenhower would be seated, it would be to his left?

A. To the left of Mr. Dannenhower.

Q. It would be over in here this way?

A. Approximately in here.

Q. Approximately in here. You are pointing to the second chair of the second row of seats from the left, and would be back of ——

A. About the 11th.

Q. About the 11th juror ——

A. Between the 11th and 12th juror there.

Q. I see. Between the 11th and 12th juror there. Would there be an alternate between you and the 11th and 12th juror?

A. No, the alternates were back here, right back here.

Q. Was your chair on the same level as the chairs of the jurors?

A. Mine was on the same level.

Q. By the way, how tall are you?

A. About five feet.

Q. Mr. Gahman, you said that when you were sworn as a juror—a tipstaff, rather, it was your duty to go out and get the jurors and bring them in one by one?

A. They called the jurors and I opened the door and gave the number to the fellow outside and he brought the juror up to the door again.

Q. I see. And then he was examined?

A. Yes sir.

Q. And on how many occasions did you call the juror after you (681) sworn? How many times did you call a number, let's say?

A. I don't remember that.

Q. About? Was it more than once?

A. If I remember right, I done that right along until the jury was filled; just opened the door and called the number of the juror and brought him in.

Q. You mean from the beginning to the selection of the jury?

A. If I remember right.

Q. Do you know that on Tuesday afternoon ——

BY MR. MARGIOTTI: If Your Honor please, I am reading from Page 272 of the record.

—the Court announced:

"Mrs. Van Sant and Mr. Gahman are the two additional tipstaves * * *"

Then in parentheses appear the words:

"* * * (Mrs. Van Sant and Mr. Gahman sworn.)"

And then the very next thing that occurs is by

"THE COURT: Members of the jury, in addition to what I have told you as to the purpose of your visiting this place, I say to you that you will be in charge of these tipstaves and * * *."

Then they went out to see the scene. You went out to visit the scene?

A. Yes.

Q. Weren't you sworn before you went out to the scene?

A. I really don't remember anymore.

Q. All right; that is satisfactory.

BY JUDGE MURPHY: (632) Let me get counsel's position. Is it your contention a tipstaff, all of these tipstaves, were necessarily sworn on the 8th? They were working as regular tipstaves in the courtroom and they are not placed in charge of the jury as such until they are sworn. The first one that was sworn was Mr. Dannenhower. Then, as we remember it, the next one that was sworn was Mrs. Gwinner, and then later on there were two others sworn. So there were four altogether. But the second two were not sworn until the jury was completed. But that does not preclude them working as tipstaves.

BY MR. MARGIOTTI: I think you are right. It does not preclude them working as tipstaves. But the Court said:

"Mrs. Van Sant and Mr. Gahman are the two additional tipstaves."

Then they are sworn and the jury sent out.

The only reason I am calling it to your attention is the question ——

BY JUDGE MURPHY: He says all he is doing is when they call out the names he is acting as tipstaff when he opens the door and calls "Juror 78". He comes down. That is all he is doing. When the jury is selected he is sworn as the officer in charge of the jury.

BY MR. MARGIOTTI: All I know is what is in the record. I am using the record Page 272. If that bears out my contention, I am right. If it doesn't, I am wrong.

(683) BY JUDGE MURPHY: Court is clear. Go ahead. You say you have been a tipstaff for twenty years?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: In that courtroom what happens if you see people reading newspapers while a trial is on?

BY THE WITNESS: We will tell them not to read in the courtroom.

BY JUDGE MURPHY: Also in that courtroom what is the practice when you see people reading magazines?

BY THE WITNESS: We tell them not to read in the courtroom.

BY JUDGE MURPHY: Was there any change in that practice during the Darcy trial?

BY THE WITNESS: No sir.

BY MR. MARGIOTTI:

Q. Does that mean that people was not reading news-

papers or had magazines during the Darcy trial because you had such a rule?

A. I haven't seen any.

Q. That doesn't mean that they did not have them; they could have had them?

BY MR. VAN ARTSDALEN: I object.

BY THE WITNESS:

(684) A. They might have had them but I didn't see any.

BY JUDGE MURPHY: We will permit it.

BY MR. MARGIOTTI: That is all.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

CORPORAL HAROLD DANDO, called on behalf of the Respondent, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION

BY MR. VAN ARTSDALEN:

Q. Corporal, where do you live?

A. Doylestown, Pennsylvania.

Q. What is your occupation?

A. I am a State Policeman.

Q. What is your rank in the State Police?

A. Corporal.

Q. What are your general duties as Corporal in the State Police?

A. I am in charge of the State Police at Doylestown, Pennsylvania.

Q. What was your occupation on June 7, 1948?

A. I was requested —

Q. Before we get to that, Corporal, what was your official position at that time, your occupation?

A. State Policeman at Doylestown.

Q. Whether or not you were also a Corporal at that time?

A. Yes sir.

Q. Where was the particular Doylestown Barracks that you were attached to located at that time?

A. Danboro.

Q. How far is that from the Borough of Doylestown?

A. Four miles.

Q. Now, did you have any official participation in the Darcy (685) trial?

A. I did.

Q. Will you tell us, please, what that was?

A. The Sheriff's office requested assistance to transfer Darcy from the Bucks County Prison to the Bucks County Courthouse during the course of the trial.

Q. All right, sir. What participation did you have in that?

A. I took a member of the barracks from the substation each morning and I arrived at the County Prison about quarter of ten; Darcy was in civilian clothes ready to go in his cell and they would bring him out and I would have him handcuffed to either a State Policeman or a Deputy

Sheriff. We would leave the Bucks County Prison in an automobile that was parked outside and go directly north on Pine Street to the rear yard of the Bucks County Courthouse ——

Q. How far is it from the Bucks County Courthouse to the Bucks County Prison?

A. 3/10 of a mile.

Q. How many blocks is it approximately?

A. I would say approximately five.

Q. All right; go ahead.

A. When we arrived in the rear of the Buck County Courthouse we would take Mr. Darcy from the car and go in through the rear door into a corridor and take the handcuffs off him there and then take him into the main courtroom and seat him in back of the defense table.

Q. Will you point out on "Relator's Exhibit No. 135" where it was you would seat the defendant when he was brought in?

A. He would be put in the second or third chair.

Q. You are pointing to the second or third chair to the right of the main corridor immediately in front of the railing separating (686) the spectators benches from the main floor of the courtroom, is that right?

A. That is true.

Q. And was this procedure followed on every day of the trial?

A. All through the trial, sir.

Q. Were you in uniform?

A. Never.

Q. What about the other policeman that you would take along?

A. He was in civilian clothes.

Q. Was it always the same State Policeman you took along?

A. No. I took different members of my station along with me. I went everyday but I took a different Trooper with me.

Q. What, if anything, can you tell us about persons in uniform in the courtroom?

A. I never seen a uniformed State Policeman in the courtroom.

Q. What about any other police?

A. I never seen any other uniformed policemen.

Q. Were you there in the courtroom throughout all times during the Darcy trial that Court was in session?

A. No sir. I wouldn't say I was there at all times. I would say I was there 90% of the time. I probably would get a call to leave and answer the phone on one or two occasions.

Q. Were you always in the same car with Mr. Darcy when he was brought to the courthouse?

A. Yes sir.

Q. What about leaving the courtroom? Explain that procedure.

A. Well, at the noon session when Court would adjourn we would take Mr. Darcy back to the prison and he would have his dinner. I would go home and eat and I would go back to the prison and get Mr. Darcy and take him back for the afternoon session. Then (687) when Court adjourned at night I would take him back to the prison.

Q. At any time throughout the course of that trial were there any crowds around the defendant when you took him from or into the courtroom?

A. No sir.

Q. Did you hear or observe any persons make any statements in reference to the case while you were conducting the defendant back and forth from the courtroom to the jail?

A. No sir.

Q. Did you hear any threats being made of any sort?

A. No sir.

Q. Were there—will you state whether you observed any demonstrations on the streets of Doylestown?

A. No sir.

Q. Were there any persons gathered around the Bucks County Prison on any occasion either when you took Mr. Darey back to the prison or brought him from the prison?

A. No sir, there was not.

Q. Was there ever any difficulty driving the automobile from the Bucks County Prison to the Bucks County Courthouse or from the Bucks County Courthouse to the Bucks County Prison?

A. No sir.

Q. Do you recall whether or not the defendant, David Darey, ever said anything to you relative to his trial?

A. We never discussed the trial.

Q. Did he ever make any complaint to you about receiving an unfair trial?

BY MR. MARGIOTTI: (688) We object, being negative testimony.

BY JUDGE MURPHY: It may or may not be. It may be very affirmative. But it isn't what we are here for. Is it?

BY MR. VAN ARTSDALEN: I will withdraw the question.

BY JUDGE MURPHY: All right.

BY MR. VAN ARTSDALEN:

Q. Were you armed at the time of conducting the defendant back and forth?

A. Yes sir.

Q. Where did you keep your arms?

A. In my back pocket. I had a holster in the back pocket.

Q. Was it visible or was it—was it or was it not visible?

A. It wasn't visible.

Q. Do you recall the location of the various tables in and about the courtroom at the time of the trial?

A. I have a recollection, yes sir.

Q. Corporal, I want to show you "Relator's Exhibits Nos. 118, 119, 120, and 121," and ask you whether they accurately depict the present conditions in the Bucks County Courthouse?

A. Yes sir.

Q. Do you observe in those pictures any changes from the conditions as existing at the time of the Darey trial?

A. The third chair on the bench is all—is the only change I see.

Q. What about the location of the tables that are indicated in the photographs?

A. They are the same places they were during the trial.

Q. Did you know Judge Boyer at the time of the trial, sir?

(689) A. Yes sir.

Q. Did you see or observe Judge Boyer in the courtroom during the course of the trial?

A. Yes sir.

Q. Will you tell us on what occasion?

A. Well, he would come out with Judge Keller in the morning and they would take their seats at the bench and discuss some business and then he would leave.

Q. When you say "he," to whom are you referring?

A. Judge Boyer.

Q. All right. I call your attention to the evening session Friday evening, June 11. Were you present in Court on that occasion?

A. I was, sir.

Q. Do you recall seeing Judge Boyer in the courtroom on that occasion?

A. No sir.

Q. Do you have any recollection as to where Mr. Biester was seated during the evening of Friday?

A. No sir.

Q. Do you recall the charge of the Court, that phase of the case?

A. No sir.

Q. And where did you sit during the trial of the case, Corporal?

A. To the rear of the defense table.

Q. Would you indicate on "Relator's Exhibit No. 135," please?

A. When we would bring Mr. Darcy into the courtroom he would be seated in one of these three chairs here —

Q. You are indicating three chairs immediately in front of the ——

A. Spectators.

Q. —spectators ——

A. That is right.

(690) Q. —on the first section to the right as you enter the main courtroom?

A. That is right. And he would remain in one of those three chairs until the trial started. Then I would move him up to the seat at the defense table.

Q. And where would you sit?

A. I would be to the rear of him in one of these chairs here.

BY MR. MARGIOTTI: Which seats?

BY THE WITNESS: Well, anyone of these four or five. During the whole course of the trial I would be in any one

of them. I would be to the rear of Darcy who would be sitting at the defense table.

BY MR. VAN ARTSDALEN:

Q. Now, Corporal, do you have any recollection as to the benches immediately to the rear of where you were seated?

A. That was the spectators right in back in this row of seats back this way, the spectators.

Q. At any time throughout the course of that trial do you recall hearing any statement made by the spectators in the courtroom?

A. No sir.

Q. Were there any outbursts in the courtroom?

A. No sir.

Q. Do you recall any times when the Court called for order in the courtroom?

A. No sir.

Q. Or any of the Court officials?

A. No sir.

Q. Did you see any newspapers or magazines in the courtroom?

(691) A. No sir.

Q. How long have you been a Pennsylvania State Policeman, Corporal?

A. Twenty-three years.

Q. How long have you been in charge of the Doylestown Barracks?

A. Eleven years.

Q. Did you observe anything unusual at all throughout the course of this trial?

A. No sir.

Q. Did you observe anything unusual outside of the courtroom throughout the course of this trial?

A. No sir.

Q. Corporal, as a Pennsylvania State Policeman have you had any official connection with any other murder trials?

A. Yes sir.

Q. Can you give the Court any estimate of the number?

A. Oh, I will say one-half dozen.

BY MR. VAN ARTSDALEN: That is all.

CROSS-EXAMINATION.

BY MR. MARGIOTTI:

Q. Corporal, in taking the defendant back and forth to the Doylestown Jail—to the courthouse, that was in an automobile?

A. Yes sir.

Q. And, of course, you weren't stopping along the road to talk to people or have people talk to you?

A. That is right, sir.

Q. Now then, you have testified that on occasions you saw Judge Boyer come on to the bench, is that right?

A. Yes sir.

Q. And do you remember how long the Darcy trial lasted your (692) recollection, how many days it lasted?

A. Why, I think the Darcy trial lasted about seven days.

Q. And during those seven days did Judge Boyer come on the bench every day?

A. I don't know, sir.

Q. Do you know what portion of those seven days he came on the bench?

A. No sir.

Q. Would you know how long he stayed on the bench when he did come on the bench?

A. No sir.

Q. Were you in the courtroom at a time when there was a sidebar conference between the Judges and the attorneys, Mr. Achey and the District Attorney?

A. I don't remember.

Q. You don't remember that?

A. No sir.

BY MR. MARGIOTTI: Sergeant, I think that is all—Corporal. Maybe you ought to be a Sergeant.

(Witness excused.)

MR. FELIX R. GOWAN, called and sworn on behalf of the Respondent, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Gowan, where do you live?

A. Doylestown.

Q. What is your address?

A. 118 East Oakland Avenue.

Q. What is your age?

(693) A. Fifty-one.

Q. What is your occupation?

A. Chief of Police.

Q. Of what district?

A. Doylestown, Bucks County.

Q. How long have you been Chief of Police of Doylestown Borough?

A. Since April 1, 1941.

Q. What was your occupation prior to that time?

A. I was with the Pennsylvania State Police.

Q. How many years had you been with the Pennsylvania State Police?

A. Fifteen.

Q. Were you Chief of Police of Doylestown during May and June 1948?

A. Yes sir, I was.

Q. Were you Chief of Police in Doylestown Borough also from December 1, 1947?

A. Yes sir, I was. I have been Chief since 1941.

Q. Now then, Mr. Gowan, do you recall hearing about the killing at Feasteryille?

A. Yes sir, I do.

Q. From the time of that occurrence up to and through the completion of the Darcy trial did you observe any demonstrations in the Borough of Doylestown in relation to this case?

A. No sir, I did not.

Q. And were you in Doylestown constantly throughout that period of time?

A. Yes sir, I was.

Q. In your official capacity as Chief of Police were any complaints made to you concerning any demonstrations in the (694) Borough of Doylestown?

A. No sir, there was not.

Q. During the Darcy trial what, if any, things did you notice in and about Doylestown?

A. Nothing unusual.

Q. What about the number of persons in Doylestown?

A. The only increase or the only noticeable increase in

persons was at noon-time when Court would adjourn. It would be like any other term of court. There would be more people coming down from the courthouse than there would when the court was not in session. That was only normal. Every Court session there would be some more people coming down.

Q. Did you have any traffic problems during that week?

A. No sir, we did not.

Q. Did you make any arrests during that week?

A. No sir.

Q. During that week for any disorderly conduct?

A. No sir, we did not.

Q. Did you observe any large crowds in and around the courthouse?

A. No sir.

Q. Were you up around the courthouse on any occasion?

A. I got up a couple of times a day; passed it on occasion every day.

Q. Did you assign any extra officers because of this case?

A. No sir.

Q. Was there any request by any public official for any particular police precautions?

A. No sir, there was not.

Q. Was there any request by any person?

A. No sir, there was not.

(695) Q. Did you attend any portion of the Darcy trial?

A. No sir, I did not.

Q. Did the same conditions exist you have testified to in the week prior to the Darcy trial?

A. I don't—things have been normal around there. If Court was in session a week prior to the trial then there were some more people coming down at lunch time because where I am stationed getting children across people coming from the courthouse and they want to go to eat anywhere in town they must come across that intersection.

Q. What intersection is that?

A. Case and Monument.

Q. How far is that from the courthouse?

A. I would say one square.

Q. And during the week of the Darcy trial did you constantly stand on duty there at any portions of the day?

A. Yes sir.

Q. What times of day?

A. Mostly during the noon hour from 11:30 to 1:00. That is when the children come across, and a man there all the time.

BY MR. VAN ARTSDALEN: You may cross-examine.

CROSS-EXAMINATION.

BY MR. MARGIOTTI:

Q. Chief, did you assign any members of your force to the maintenance of order in the courthouse during the Darcy trial?

A. No sir.

Q. Do you know of any police officers having been so assigned?

A. No, I do not.

Q. You are still Chief?

(696) A. Yes sir.

BY MR. MARGIOTTI: Thank you. We are through.

(Witness excused.)

MR. CLARENCE IRWIN, called and sworn on behalf of the Respondent, on direct- and cross-examination, testified as follows:

DIRECT-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Irwin, what is your occupation?

A. County Detective of Bucks County.

Q. Where do you live?

A. Doylestown, Pennsylvania.

Q. How long have you been a resident of Doylestown?

A. Thirty-three years.

Q. How long have you been one of the County Detectives of Bucks County?

A. Since September 1, 1952.

Q. What was your occupation from December 1, 1947 through June 15, 1948?

A. I was Assistant Chief of Police of Doylestown Borough.

Q. How long had you been prior to December 1, 1947 Assistant Chief of Police or on the police force of Doylestown?

A. I became a member of the Doylestown Police Force on January 1, 1942.

Q. Do you know how many persons were on the Doylestown Borough Police Force on December 1, 1947?

A. I believe there were six.

Q. Was there any increase in that number between that time and June 15, 1948?

(697) A. I don't believe so.

Q. Mr. Irwin, were you on duty as Assistant Chief of

Police during the week commencing June 7, 1948 through June 15, 1948?

A. I was. I worked all night work.

Q. You were on only night duty, is that correct?

A. That is right.

Q. During the period of time that I have referred to, were there any unusual occurrences that occurred in the Borough of Doylestown that came to your attention?

A. No sir.

Q. Were there any disturbances of any sort?

A. No sir.

Did you make any arrests for any disorderly conduct?

A. No sir.

Q. Now, Mr. Irwin, did you attend any of the Darcy trial?

A. I attended several sessions in the afternoon.

Q. And will you tell us, please, what you saw and observed when you attended those sessions?

A. Nothing out of the ordinary of any other Court session.

Q. Let me ask you this first: Were you in uniform or not in uniform?

A. No, I went on my own as a spectator.

Q. Were you requested by any person to attend?

A. No sir.

Q. All right. Will you tell us, please, what you saw and observed?

A. Nothing unusual.

Q. What about the number of persons that were in the courtroom on the occasions that you went in?

A. Well, at different times I attended in the afternoon at no time that the courtroom was full.

Q. Did you observe any disturbances in the courtroom?

(698) A. No sir.

Q. On how long a period of time were you in the courtroom during the Darcy trial?

A. Sometimes it would be one hour; sometimes maybe a little longer, maybe two hours.

Q. Do you know what days you were there?

A. I don't remember the days, no sir.

Q. Do you know how many days you were there?

A. I would guess oh, three days—three afternoons.

Q. On any ——

BY MR. MARGIOTTI: I ask that that answer be stricken because it is a guess.

BY JUDGE MURPHY: What is your best judgment as to the number of days you were there?

BY THE WITNESS: Three afternoons, to the best of my judgment.

BY MR. VAN ARTSDALEN:

Q. On any of those occasions do you have any recollection of Judge Boyer being in the courtroom?

A. No, I don't.

Q. You knew Judge Boyer at that time?

A. Yes, I did.

Q. Did you know Judge Keller at that time?

A. Yes, I did.

Q. On the occasions that you were in the courtroom did you see and observe any newspapers or magazines by any one in the courtroom?

A. No, I did not.

Q. Where would you sit when you came into the courtroom, Mr. (699) Irwin?

A. I generally sat right as you entered the courtroom, either to the right or left of the center aisle.

Q. On one of the benches to the rear?

A. One of the benches to the rear.

Q. At that time did you know Joseph Darcy?

A. I did not.

Q. What were the hours of your duty in the Borough of Doylestown during that period?

A. The hours of duty were from 10:00 o'clock at night to 8:00 o'clock in the morning.

Q. Do you know what hours the Chief of Police was on?

A. 8:00 o'clock in the morning to 4:00 o'clock in the afternoon.

Q. Who was on duty from 4:00 o'clock in the afternoon until the time you went on?

A. Oh, there would be other policemen on at that time.

Q. Did you as Assistant Chief of Police receive any complaints from any persons about any disturbances in and about Doylestown?

A. No sir.

Q. Were any complaints made to you by any police officers?

A. No sir.

Q. Did you receive complaints from any person?

A. No sir.

BY MR. VAN ARTSDALEN: You may cross-examine.

CROSS-EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Irwin, you worked from 10:00 o'clock at night to 8:00 o'clock in the morning?

A. That is right, sir.

Q. And when would you get your sleep?

(700) A. When I got home in the morning.

Q. I assume so. What time would you go to bed usually?

A. Well, anywhere from 8:30—9:00—10:00 o'clock.

Q. And what time would you usually get up?

A. Well, that depended on what I had to do that day.

Q. Well, on an average, usually when would you get up?

A. Sometimes I wouldn't go to bed until maybe 11:00 or 12:00 o'clock.

Q. What was your average arising time?

A. Oh, I would say 1:00 o'clock in the afternoon.

Q. 1:00 o'clock in the afternoon. Now you said you went to the courthouse?

A. That is right.

Q. Who went with you, if anybody?

A. Myself.

Q. How long would you stay?

A. An hour, an hour and a half.

Q. What time would you get there?

A. Oh, 1:30; sometimes 2:00 o'clock.

Q. And these sessions were all in the afternoon?

A. All afternoon sessions; that is right.

Q. As I understood your testimony, although you entered the courthouse you hold no recollection on those three occasions of seeing Judge Boyer?

A. No sir.

Q. You don't mean by your answer that he wasn't there; you just don't remember whether he was or he wasn't there?

A. On my recollection, the Court was in session when I would arrive and I did not notice Judge Boyer.

Q. Anywhere?

(701) A. Anywhere, no sir.

Q. Do you recall definitely you didn't notice him or don't you know whether you noticed him?

A. I just don't recall noticing Judge Boyer.

Q. I see. You usually sat in the back?

A. Yes, somewhere to the rear of the courtroom.

Q. In the last row?

A. I wouldn't say the last row.

Q. Near there somewhere?

A. Within the last four or five rows to the back.

Q. Either to the left or right, wherever you could get a seat?

A. Yes sir.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

BY JUDGE MURPHY: It is now 3:24. We will take the usual ten-minute recess.

(Recess.)

(During the recess the Grand Jury made a report to the Court.)

(Court resumes after the Grand Jury made a report to the Court with all parties, including the Relator, David Darcy, present in Court.)

BY JUDGE MURPHY: Let the record note that during the time the Grand Jury was called in the defendant was excused in charge of the bailiffs in the jury room and did not return until that business had been completed and the Grand Jury had departed. Isn't that what happened?

BY MR. KAUFMAN: That is what happened.

BY JUDGE MURPHY: (702) We have noted on the record the disappearance or the absence of the defendant during the proceeding that just occurred and his return to the courtroom—the Relator.

BY MR. MARGIOTTI: And in which he had no part.

ATTORNEY WILLARD S. CURTIN, called and sworn on behalf of the Respondent, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION:

BY MR. VAN ARTSDALEN:

Q. Mr. Curtin, where do you live?
A. Morrisville, Bucks County.
Q. What is your present occupation?
A. I am an Attorney.
Q. Where is your office?
A. In Morrisville, Pennsylvania.
Q. What kind of practice do you conduct?
A. The general practice of law.
Q. What, if any, official position did you have with the County of Bucks on December 1, 1947?
A. At that time I was Assistant District Attorney of Bucks County.
Q. When were you first appointed Assistant District Attorney of Bucks County?
A. In January of 1938.
Q. Were you an Assistant District Attorney of Bucks County from then until sometime after December 1, 1947?

A. Yes sir, until September—either August or September 1949.

Q. Did you obtain any official position with the County of Bucks after that?

A. I was then the District Attorney.

Q. Were you appointed District Attorney at that time?

(703) A. Yes sir. I was appointed to fill out the unexpired term of Edward G. Biester and elected to the office at the conclusion of Mr. Biester's term.

Q. When were you elected to the office of District Attorney?

A. I think, sir, it was in November 1949.

Q. Did you continue as District Attorney for a full term?

A. Yes sir.

Q. Did you run for re-election?

A. No, I did not.

Q. Now, Mr. Curtin, were you present in Court during all of the sessions of the trial of the case of Commonwealth vs. David Darcy?

A. Yes, I was.

Q. Will you tell us, please, in what capacity?

A. I assisted the then District Attorney Edward G. Biester in the trial of the case. I believe that I aided in the examination of the jurors in the voir dire and aided Judge Bister throughout the rest of the trial.

Q. Were you present throughout the Foster-Zietz trial?

A. Yes, I was.

Q. Will you state whether or not that took place prior to the Darcy trial?

A. It did.

BY JUDGE MURPHY: All right, sir.

BY MR. VAN ARTSDALEN:

Q. Will you state whether or not you examined the prospective jurors on the voir dire examination?

A. In which trial are you speaking of —

Q. In the Darcy trial.

(704) A. I did; some of them, sir.

Q. All right. Do you know whether any of the jurors—prospective jurors—called on voir dire in the case of Commonwealth vs. David Darcy—do you know whether any of them were in Court during any of the sessions of the Foster-Zietz trial?

A. I would say—it is very unlikely —

BY MR. MARGIOTTI: We ask that the answer be stricken from the record.

BY JUDGE MURPHY: We will permit it to stand for the time being. We will permit thorough examination on it. If it isn't added to and thoroughly explained, we will strike it. We will permit it to stand if the witness desires to explain or counsel to amplify. If they don't, a motion to strike.

BY MR. VAN ARTSDALEN:

Q. Mr. Curtin, do you know whether any of the prospective jurors that were called in voir dire in the case of Commonwealth vs. David Darcy were present in Court during the Foster-Zietz trial as a result of the venire issued?

A. They were not —

BY MR. MARGIOTTI: We object for the reason the record is the best evidence.

BY JUDGE MURPHY: Now, as I understand it, the question that was asked of the witness was were any of

the jurors who were examined in the Darcy trial included in the venire directed to produce veniremen for the Foster-Zietz trial; and if they were in that venire, were any in Court during the Foster-Zietz trial?

That is your question, sir. Is that what you mean?

(705) BY MR. VAN ARTSDALEN: No sir. I will withdraw the question.

BY JUDGE MURPHY: Reframe the question.

BY MR. VAN ARTSDALEN:

Q. Mr. Curtin, do you know on what day the jurors that were called on for the voir dire of the David Darcy case first appeared in Court?

A. June 7, 1948.

Q. Now, Mr. Curtin, will you tell us, please ——

BY MR. MARGIOTTI: Your Honor, I move the answer be stricken for the reason that the record is the best evidence.

BY JUDGE MURPHY: No; the record does not help us much. You have challenged the record, and we are now trying to find out what the fact was. You say the record is not the best evidence, it is wrong, as I understand it, in two particulars. The venire went out on a certain date to bring in certain jurors to Zietz-Foster. There was another venire to bring in certain jurors to Darcy. Then the question came up what date did they appear. We suggested to counsel that it may be if warrants were produced it would show when they came. They haven't appeared as yet. The question is did they appear, if ever? Your objection is overruled. Did they appear, if ever, and if so, when?

BY MR. VAN ARTSDALEN:

Q. Mr. Curtin, will you tell us, please, what you can recall as to the number of persons ——

BY JUDGE MURPHY: The Court suggested that advisability, and certainly we are not trying to direct in this case, but we are seeking (706) the truth. We suggested at the opening the advisability of finding out when these jurors appeared by warrants for their pay. Have you any evidence to offer on that?

BY MR. VAN ARTSDALEN: We are going to call one of the employees from the Treasurer's office which we believe and hope will be able to clear up that situation.

BY JUDGE MURPHY: We will take this subject to the other evidence to follow.

Read the partial question, Mr. Reporter.

(Partial question read by the Reporter.)

BY MR. VAN ARTSDALEN: —present in the courtroom during the various sessions of the Darcy trial?

A. At no time was the courtroom one-half full. The greatest number, I would say, would be there during one evening session which, to my recollection, was on a Friday night, and at that time it did not one-half fill the courtroom, which is a very large courtroom.

Q. How many spectators were there during the calling of the jurors on voir dire?

A. Very few; I would say not over fifty-sixty.

Q. Mr. Curtin, will you tell us, please, how the jury came in and retired from the courtroom?

A. You are speaking, sir, of the full panel or the twelve and two alternates that were chosen in this case ——

Q. I am speaking of the jurors that were ultimately sworn in this case.

(707) A. Yes, sir. They would come into the courtroom every morning at just about 10:00 o'clock. It was the practice they would be brought to the courtroom by the persons having them in charge very shortly before 10:00 o'clock—within a few minutes of 10:00 o'clock; they would then be kept in a room, a small room which is off the courtroom; they would be in that room being covered with tipstaves; and at 10:00 o'clock they would be brought into the main courtroom by the persons having them in charge and they would take their seats in the jury box. They would come in through the door which as you face the bar and the bench is on the left—right-hand side.

Q. Do you recall whether there were any disturbances in the courtroom at any time in the trial of David Darcy?

A. There were not.

Q. Do you recall whether the courtroom was at any time cleared by order of the Court?

A. It was not.

Q. What, if anything, can you tell us as to the general conduct of the trial?

A. It was an orderly trial, differed in no way than any of the other trials that we had there. There was no unusual disturbance or nothing unusual occurred.

Q. Who examined the witnesses in the case for the Commonwealth?

A. The then District Attorney—presently Judge Biester, then District Attorney Biester.

Q. Do you recall whether you did any of the examination of the witnesses?

A. To the best of my recollection, I did not.

Q. Do you recall whether or not a statement was introduced into evidence?

(708) A. There was.

Q. And do you recall whether or not that was read to the jury?

A. It was.

Q. Do you know by whom?

A. I believe I read the statement to the jury.

Q. Now, what can you tell us, Mr. Curtin, concerning the presence of Judge Boyer in the courtroom during the course of the Darcy trial?

A. Well, Judge Boyer would come into Court with Judge Keller when Court was opened at 10:00 o'clock in the morning and they would both take their seat at the bench, and they would then have—the Court would then be officially opened. They would have miscellaneous business, which would take a few minutes. Then there was other criminal work which was being done that same time, and Judge Boyer, I believe, for the first two days—my recollection is for two days he withdrew from the bench when the miscellaneous business had been completed and withdrew to another courtroom where he had other criminal matters ——

Q. Who represented the Commonwealth in those other criminal matters, if you know?

A. It was the practice and was on that occasion a situation where I would request any attorney that happened to be free and in Court to represent the Commonwealth for those guilty pleas, those guilty pleas he was handling.

Q. How many Assistant District Attorneys were there at the time of the trial?

A. Just one; myself.

Q. Do you recall seeing Judge Boyer sitting in the courtroom on any occasion other than on the bench?

BY MR. MARGIOTTI: (709) We object until the witness is given an opportunity to finish his first answer. He started to tell about Judge Boyer being in there for two sessions and then the District Attorney is asking a number of other questions. He hasn't finished that first question.

BY JUDGE MURPHY: Had you completed the answer?

BY THE WITNESS: No sir.

BY JUDGE MURPHY: Then you complete your answer.

BY THE WITNESS: There was one occasion when Judge Boyer was on the bench in the very early stages of the trial, as I recall, after the jury had been selected, and there was a conference at sidebar and I understand that—although I did not go to sidebar, I understood there was some objection made by Mr. Achey to Judge Boyer and Judge Boyer, to my recollection, then withdrew. He did not go on the bench again during the trial. There were two or three occasions when I noticed him seated in the course of the trial at a chair just inside of the courtroom by the doorway which led from the courtroom to the Judge's Chambers.

BY MR. VAN ARTSDALEN:

Q. Referring to "Relator's Exhibit No. 135," will you indicate where this chair is that you have just referred to?

A. Yes sir. It is a—there were two chairs that Judge Boyer used, as I recall it. One was the chair immediately inside the courtroom. That is immediately inside the courtroom from the door (710) to his office, which would

be the very first chair located on the right-hand side of this plan ——

Q. That is on the right-hand side as the Court would sit on the bench, is that correct?

A. Yes sir.

On another occasion I noticed Judge Boyer seated in Chair No. 4, which would be the first chair in front of the railing in front of the spectators benches.

Q. And you are pointing to a chair that has been marked "Judge Boyer," is that correct?

A. That is right, sir.

Q. Mr. Curtin, I want to refer you to "Relator's Exhibits Nos. 100—strike that. I refer you, Mr. Curtin to "Relator's Exhibits Nos. 118, 119, 120, and 121," and ask you whether you can recognize those exhibits, please?

A. Yes sir, I represent—I recognize the scene depicted on those four exhibits.

Q. And do they accurately depict the present conditions existing in the Bucks County Courthouse?

A. They do.

Q. Will you tell us whether or not there are any changes that you observe in those photographs that were not existent at the time of the Darcy trial?

A. There is one change that I would notice, Mr. Van Artsdanel. In "No. 118" it shows three chairs behind the Judges bench. At the time of the trial there were only two.

Q. Will you state how many Judges there were in Bucks County at that time?

A. Two.

Q. Now, Mr. Curtin, referring again to those exhibits, there are certain tables and chairs indicated in those pictures, is that (711) correct, sir?

A. That is correct.

Q. Are you able to state whether or not there are any changes between the location of the tables and chairs shown in those pictures from the conditions existing at the time of the Darcy trial?

A. As they are represented ——

BY JUDGE MURPHY: Now the Grand Jury will please retire until called. We don't want them in here while the defendant is in this room I don't want to have any misunderstanding.

If you will have the prisoner retire, we will have the Grand Jury report.

Has the prisoner been retired? Will someone answer my question?

BY MR. MARGIOTTI: Yes, Your Honor.

(The Relator, David Darcy, retires from the room while the Grand Jury makes a report to the Court.)

BY MR. MARGIOTTI. And the witness has been retired too.

(Grand Jury makes a report to the Court.)

(The Relator, David Darcy, is brought back into the Court.)

BY JUDGE MURPHY: Let the record note that the Grand Jury has retired from the courtroom whereupon the defendant was then called back into the courtroom and the witness resumed the stand.

May we say to counsel for the Relator and counsel for the Commonwealth that there has been a death in the family of the Court Reporter and he will not be available tomor-

row, but we will have another Court Reporter in his stead, and if the problem comes up referring back to testimony, the (712) Court has ample notes, I think, and if not, we will meet that eventuality when it comes.

Read the last question, Mr. Reporter.

(Last question read by the Reporter.)

BY THE WITNESS:

A. The tables as they are shown in these four exhibits are exactly as they were during the time of the Darcy trial; no changes.

BY MR. VAN ARTSDALEN:

Q. Mr. Curtin, were you present during the Friday evening session?

A. Yes, I was.

Q. Do you remember or have any recollection as to what was done with the Commonwealth's exhibits when they were produced into evidence?

A. Yes sir. Prior to the exhibits being produced into the evidence they were kept in a large cardboard box behind District Attorney Biester and myself. After exhibit numbers had been attached to them they were replaced in that cardboard box. As they were offered they were from that point on either on the front of the Clerk's bench or at various times they would be at the end of the bench in front of the bar in the immediate vicinity of the Court Stenographer.

Q. Will you tell us, please, where the Court Stenographer sat in the trial of this case? Can you refer to "Relator's Exhibit No. 135," please?

A. Yes sir. Referring to "Relator's Exhibit No. 135," the Court Stenographer sat at the first chair as you look from

the bench towards the back of the courtroom, the very first chair at the bench in front on the left-hand side, which would be the chair immediately—well, diagonally in front of where the witness sat.

(713). Q. How far was the Commonwealth's table from the nearest juror?

A. The front of the Commonwealth's table would be about four to five feet from the front of the nearest juror—the front of the chair of the nearest juror.

Q. And how far was it from the Commonwealth's table to the—strike that. Was there a table to the rear of the Commonwealth's table?

A. There was.

Q. And what was the purpose of that table?

A. That was a table where the reporters constantly sat and where they were seated during this trial when they were there.

Q. What about members of the bar not engaged in the trial of the case, where would they sit?

A. They sat, sir, on the row of chairs in front of the railing, particularly those chairs where were as you face towards the back of the courtroom; those chairs, which would be on the right-hand side of the main aisle, and also in the chairs which were placed in front of the reporters table, and then sometimes they would be in the chairs in back of the reporters table if there were no reporters seated at the table.

Q. Can you give us any estimate of the distance between the Commonwealth's table and the table which, I believe, you have referred to as being used by members of the press?

A. I would say there was at least fifteen feet separating those two tables.

Q. Was there at the time of the Darcy trial?

A. Yes sir. The tables then were exactly the same as they are now.

Q. Mr. Curtin, referring again to "Relator's Exhibit No. 135," can you give us any estimate of the distance between the chair (714) immediately in front of the railing separating the spectators benches from the floor of the main court-room which has been marked as "Judge Boyer," can you give us any estimate of the distance from there to the table which you have referred to as the table used by members of the press?

A. The back of the table used by members of the press would be, I would say, about ten feet in front of the chair which is marked "Judge Boyer."

Q. And were there any chairs intervening during the course of the Darcy trial?

A. Yes, there were chairs in back of the reporters table immediately in back that were used. When you were seated at those chairs you would be at the table.

Q. Mr. Curtin, at any time throughout the trial do you recall seeing any spectators reading or carrying newspapers?

A. I did not.

Q. What about magazines?

A. No newspapers or magazines.

Q. I refer now specifically to "Relator's Exhibit No. 136." Do you recall seeing any copy of "Relator's Exhibit No. 136," or anything similar to that, in the courtroom at any time during the Darcy trial?

A. I did not.

Q. Mr. Curtin, at any time during the course of the trial while the trial was in progress did you observe any outbursts in the courtroom?

A. There were no outbursts.

Q. Did you observe or did you overhear any conversations by any spectators that were seated in the courtroom?

A. During the course of the trial there was no noise from

any of (715) the spectators. Maybe when Court was over as I was leaving the room I may have heard some persons talking among themselves. I have no recollection what they said. It wasn't anything unusual. It was just ordinary conversation.

Q. Now, Mr. Curtin, do you recall where Mr. Bister was seated during the charge of the Court?

A. To the best of my recollection, sir, both Mr. Biester and I were seated in two of the chairs in the first of the two rows of chairs which were immediately in front of the reporters table.

Q. Would those chairs be at the Commonwealth' table?

A. No sir. Immediately to the rear of the Commonwealth's table there are two rows of chairs in front of the reporters table, oh, probably twelve to fifteen feet behind the Commonwealths' table.

Q. Do you recall whether there was anyone sitting at the Commonwealth's table during the charge of the Court?

A. I believe that I went to it for a few minutes but, to the best of my recollection, the Commonwealth's table had no one seated at it during most of Judge Keller's charge.

Q. Do you recall seeing Judge Boyer in the courtroom during the Court's charge?

A. I have no recollection whatsoever of Judge Boyer being in the courtroom during the charge of Judge Keller.

Q. Do you have any recollection of any note having been handed by Judge Boyer to Mr. Biester at anytime during the charge of the Court?

A. I have absolutely no recollection of any note being handed to Judge—to District Attorney Biester at any time during the charge of the Court.

Q. Mr. Curtin, you have stated, I believe, that you observed Judge (716) Boyer on the bench at certain morning sessions. What about afternoon sessions?

A. Sir, to the best of my recollection, when Court reconvened for the afternoon session Judge Boyer did not come on the bench with Judge Keller. It is my recollection he only did that when they opened Court in the morning.

Q. You have stated, I believe, that Judge Boyer retired to another courtroom. Will you describe where that other courtroom was?

A. Yes sir. At that time and at this occasion during this week the courtroom that was used by Judge Boyer was what was called the grand jury room which was on the second floor of the courthouse.

Q. How would you get there from the main courtroom?

A. You would have to leave by one of the doors, exit doors, in the back of the courtroom and take the stairs to the second floor, and the grand jury room is at the top of those stairs.

Q. Mr. Curtin, during the course of the trial where did you eat your lunches, do you recall?

A. I believe I ate most days at the Doylestown Inn.

Q. Do you recall whether that was in the main dining room or in the grill?

A. In the main dining room.

Q. Do you recall on any occasion seeing or observing the jury in the Doylestown Inn, or observing the jury on the streets of Doylestown?

A. I saw the jury in the Doylestown Inn on occasions when I was there for lunch. I have no recollection of seeing them on the streets of Doylestown.

Q. At any time when Court was in recess that you observed the jury, (717) did you observe any persons talk or talking in any way to any members of the jury with the exception of tipstaves and other jurors?

A. None whatever during the recess. Before the recess

was called by the Court the jury would be ordered removed by the Court to a room immediately outside of the courtroom immediately to the rear of the courtroom and in the corridor outside of the back. Then when Court was called then the jury would be called in again by the Court. I could add to that—all those occasions when the jury withdrew was always when Court was in session. Then the Court would reconvene before the jury would be called in again.

Q. Mr. Curtin, how near at any of the times that you have referred to in the Doylestown Inn were you to the jury?

A. At no time was I nearer than sixty to seventy-five feet from the jury. The jury had a table at the far end of the large—very large dining room, and I had a table at the other end of the dining room, which would be at least fifty —sixty—seventy-five feet away, this table being fifty feet at the very least.

Q. Mr. Curtin, have you been here throughout this hearing?

A. No, I just came here this afternoon.

Q. Did you observe any disturbances on the streets of Doylestown of any kind during the week of the Darcy trial?

A. None whatsoever.

Q. Did you observe any crowds milling about outside of the Court?

A. None whatsoever.

Q. Do you know in your official capacity whether there were any special precautions taken to guard against disturbances in the courtroom?

(718) A. There were no such precautions taken.

Q. What, if any, uniformed officers did you observe in the court room during the Darcy trial?

A. The only uniformed officers that I saw would be the

tipstaves. There were State Policemen with the defendant, I believe two, on all occasions, and there were a number of State Policemen who were witnesses who were in the courtroom, but none of them were in uniform on any occasion, to the best of my recollection.

BY MR. VAN ARTSDALEN: You may cross-examine.

CROSS-EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Curtin, at that time were the Judges—did the Judges when occupying the bench wear robes—garbed in robes?

A. They did not.

Q. They wear simple civilian clothes?

A. That is right, sir.

Q. You say that during the time of the Darcy trial you ate at the Doylestown Inn; that is for your lunch; is that right?

A. On some of the days, yes sir.

Q. How many days did you eat your lunch there?

A. Probably three; three or four.

Q. Three or four. Did you take any other meals at the Doylestown Inn?

A. During that period, yes. I think on one occasion I took my dinner there on Friday evening.

Q. On Friday evening. Did you take any other meals besides your dinner Friday evening?

A. No others.

Q. Did you go there alone to have your meals at that place?

(719) A. You mean did I walk down by myself or did I seat myself with somebody else when I got there ——

Q. Did you have dinner or lunch with somebody else?

A. I believe I did.

Q. With whom?

A. I wouldn't be able to say now who it might have been. It would be a guess. I would have to hazard a guess.

Q. I wouldn't want you to hazard a guess. Was it some Court attendant, some officer?

A. Probably Mr. Russo, the prosecutor.

Q. Who was Mr. Russo?

A. He was the Chief County Detective at that time.

Q. I see. How about Mr. Donnell or the Chief of Police?

A. Neither Mr. Donnell or the Chief of Police ever had lunch at the time I was there.

Q. Did Mr. Biester take lunch?

A. I don't think. I think Judge Biester went home for lunch. He may have been there on one or two occasions. I don't remember.

Q. You recall Mr. Russo. Do you remember any other persons?

A. I have no distinct recollection, Mr. Margiotti. It may have been some of the other witnesses. I wouldn't recall definitely.

Q. I see. At any rate, you kept yourself some distance from the jury?

A. That is right.

Q. But the jury could see you?

A. Well, the jury, to my recollection, seemed to have a pretty good time eating. They didn't pay much attention to us.

Q. They were in a position to see if they looked?

A. If they looked they might have seen us some of the occasions (720) I was there at the other end of the dining room, yes.

BY JUDGE MURPHY: In a town the size of Doylestown did you have any other choice?

BY MR. MARGIOTTI: I am coming to that.

Q. The jury could have seen you; you knew the jury was eating there?
A. Yes.
Q. And you went there?
A. Yes.
Q. Knowing the jury was eating at the Doylestown Inn?
A. Yes sir.
Q. With your witnesses and County Detective?
A. That isn't what I said.
Q. The County Detective and people ——
A. Occasionally I was there, yes.
Q. Now there are other eating places, as his Honor has asked ——

BY JUDGE MURPHY: I asked if there were.

BY MR. MARGOTTI:

Q. There were at that time?
A. Yes.
Q. Did you eat at those places?
A. On some of the occasions.
Q. On what occasions?
A. It would depend, sir—if I may elaborate on that—how much time I had. I prefer the Doylestown Inn because that is where you get your best food. If I was hurried, I would go to some other place.

(721) Q. And your table in the courtroom you say was about four or five feet from the jury?

A. The front of the table, sir, was about four or five feet from the nearest juror, so that where we were seated was about eight feet from the nearest juror.

Q. Was the table located as it is on "Exhibit No. 135"?

A. Yes sir.

Q. Were there chairs located as those on this exhibit?

A. Yes sir.

Q. Were there three chairs there?

A. There were.

Q. Now what you called the reporters table, is that the one that is between your table and the body of the courtroom?

A. No, you are pointing to the defendant's table there.

Q. Defendant's table, all right. Then the reporters table was here—you said some distance—I think you said about eight feet from the chair marked "Judge Boyer"?

A. About eight feet from the front of the chair marked "Judge Boyer" to the back of the chair behind the reporters table; eight or ten feet.

Q. At that time was there any chair between the table and—say, the chair in front of the benches?

A. Yes sir, just about like they are right there. That has been standard equipment, as far as my remembrance is, of the courtroom.

Q. Was there some other equipment, some other tables, between your table and the reporters table?

A. There was not.

Q. Was the reporters table pushed back?

A. It was not.

Q. And your particular reason for selecting the Doylestown Inn to eat was what?

(722) A. Because I enjoy eating there.

Q. Who selected the Doylestown Inn for the jurors?

A. I didn't, sir. I don't know—I don't know who made

arrangements for the hotel accommodations of the jury, so I would guess it was probably—you don't want my guess, obviously ——

Q. I don't want your guess. Now, Mr. Curtin, you were there when the jury was selected in the Darcy case?

A. Yes.

Q. And the jury—the jurors—before selection the venire was in another room?

A. That is right.

Q. And they were called in for their voir dire examination?

A. That is right.

Q. And what was the procedure after the jurors were accepted ——

BY JUDGE MURPHY: Excuse me, sir! Judge Watson has arranged to meet someone at 4:30. It is now 4:30 so we will recess until 10:00 o'clock tomorrow morning.

(Court adjourns for the day.)

(723) (March 19, 1954, 10 o'clock a. m.)

(All appearances the same as before David Darcy present in person.)

MR. VAN ARTSDALEN: Mr. Curtin.

WILLARD CURTIN, resumed the stand and testified further as follows:

MR. MARGIOTTI: If Your Honor please, may I kindly

request the Court to grant me an exception to the questions propounded by the Court to Darcy yesterday?

JUDGE MURPHY: On what ground?

MR. MARGIOTTI: On the ground that the defendant was compelled to make statements which he was not required to make by the Constitution of the United States.

JUDGE MURPHY: It is true that the defendant has the right not to testify against himself, and in this proceeding Mr. Margiotti has presented a petition to this court criticizing the previous lawyer for not permitting the defendant to take the stand to testify. The Court felt that in view of that circumstance where counsel in this case has in the petition criticized the attorney who formerly represented him to the extent of saying that he was not permitted to testify, the Court felt he should be asked that question whether or not he desired to offer any testimony. That was the inquiry made by the Court; and you have an (724) exception.

MR. MARGIOTTI: If Your Honor please, may I make one statement?

JUDGE MURPHY: Let me interrupt. If we did not ask him that question then he might very well say that you did not allow him to talk.

MR. MARGIOTTI: The issue is only on the question of feeling and prejudice under the mandate which is before your Honorable Court.

JUDGE MURPHY: But this defendant was in that court

room all the time, and the briefs before us said that he did not have an opportunity to say something, and we did not know whether you would have asked him or not. So we asked him. And as we understand you, then the next lawyer could say that we did not ask him. Now, constitutional law has got to a point where the Court, in a sincere effort to try to protect the constitutional rights of the defendant, in one case the counsel is criticized and in the other the Court asked him and then the other counsel criticizes for asking him—then we have got to a sorry end.

MR. VAN ARTSDALEN: Mr. Margiotti, I want to ask you a question because I want your views. In what way could the notice of this court have interfered with the rights of your client in this proceeding?

MR. MARGOTTI: In that the Court required the (725) defendant to stand up to answer the question, "Have you anything to add to the testimony which has been produced?"

JUDGE MURPHY: In what way was he injured or damaged?

MR. MARGIOTTI: I do not think, whether he is injured or damaged, he is required to make any answer under the Constitution.

JUDGE MURPHY: I do not understand your point.

MR. MARGIOTTI: His Honor, Judge Murphy, has ruled and the record is there.

JUDGE MURPHY: The record is there, and the record

shows that Mr. Margiotti and Judge Pannell did not object at that time. They were both in court, listening, and we hope their eyes were open. We think that counsel saw what happened. I just want to add one other thing: If the Constitution of the United States does not stand for truth and justice, we better find out.

CROSS-EXAMINATION.

BY MR. MARGIOTTI:

Q. Now, Mr. Curtin, I believe you testified yesterday that this case began on June 7?

A. I believe that is correct.

Q. Do you know how much time elapsed between the ending of the Foster-Zietz trial and the beginning of the Darcy trial?

(726) A. The Foster-Zietz trial concluded the week previously. At the moment I am not familiar with what day of that week it concluded, but it was the week before.

Q. Approximately was it toward the end of the week?

A. My recollection would be, sir, that it was around the middle of the week sometime. It may be a day or two one way or the other.

Q. You have appeared in opposition to the relator in all steps in this case, haven't you?

A. That is correct.

Q. You appeared before the Pardon Board in opposition to commutation?

A. I did, sir.

Q. I believe you argued for the Commonwealth before the Court of Appeals in one of the cases, I believe the final case?

A. That is true, sir.

Q. You appeared in every step until you left the Office of the District Attorney?

A. That is correct.

Q. Now in appearing before the Pardon Board, do you remember making a statement there that three weeks elapsed between the ending of the Foster-Zietz trial and the beginning of the Darcy trial?

A. No, Mr. Margiotti. I have no recollection of that statement.

(727) Q. Do you remember being asked how much time elapsed between the two trials?

A. No. I do not.

Q. Do you remember being asked when the jurors first reported for the Darcy trial?

A. No, sir. I do not.

Q. Do you remember this statement, that they reported and were sent home and came back for the Darcy trial?

A. No, sir. I do not.

Q. You have testified to the Court on the 7th of June ——

A. That is right.

Q. That was the beginning fo the trial?

A. Yes, sir.

Q. Had they appeared before that time?

A. No. They had not.

Q. Do you know whether they had?

A. I do.

Q. Have you looked at the record?

A. Yes.

Q. What record have you looked at?

A. I checked last night. I looked at the vouchers of warrants for the appearance of jurors and the days they were paid in the Darcy case.

Q. Have you looked at the docket entries of the court matters?

(728) A. I have not.

Q. While I am getting those records, I will ask you a few more questions in the interests of time. Is it a fact that the Darcy case was not scheduled for trial originally for the May term?

A. It is my recollection, sir, that was the way the two trials were scheduled, that the Darcy trial was to start as soon as the other trial had been completed the following week.

Q. Isn't it a fact that it was announced by your office and carried in the newspapers, that only two of the defendants would be tried at the May term, and that the other defendant, Mr. Darcy, would be tried at the next term?

A. I don't know what was carried in the newspapers, but I have no recollection of our office announcing that there was to be any interval between the two trials.

Q. Do you know when the jurors appeared for the Foster-Zietz trial?

A. My thought would be that it would be two Mondays prior to June 7.

Q. I am going to show you now the criminal minutes marked—I thought this had an exhibit number, but I believe your Honor waived that until we had it photostated and then offered it in evidence, but I do not see any exhibit number on the book, but the minutes anyhow on Page 391 ——

(729) A. What do you want me to look at?

Q. I want you to look at Page 391.

A. All of it, or do you want to direct my attention to some part of it?

Q. I will direct your attention to part of it so you can quickly go to it. Will you state now when the jurors appeared for the Foster-Zietz trial?

A. Well, this docket ——

MR. VAN ARTSDALEN: If the Court please, the record speaks for itself. I object to the question.

JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read.)

JUDGE MURPHY: We understand the question to be this: The witness on the stand has made a statement when the jurors appeared. Two weeks before said he, two weeks before June 7. He has now been shown the criminal minutes docket and asked to read it, and, as I understand it, he asked in face of reading that, does he change his opinion?

MR. MARGIOTTI: That is right.

JUDGE MURPHY: We will permit the question.

THE WITNESS: This docket indicates that the jurors reported on May 24, which would be two weeks before June 7.

BY MR. MARGIOTTI:

(730) Q. All right. Now, then, when that jury appeared at the Foster-Zietz trial where did it appear, what room?

A. The jury would be summoned and their roll would be called in the main court room.

Q. Which was the custom in that court?

A. That is right.

Q. Now, will you go to the docket—same docket, Page 393, and will you tell me—will you read that, please, and after reading that I want to ask you a question.

A. Do you want me to read it aloud?

Q. No. Read it to yourself and I will ask you a question.

A. O. K. I have read it.

Q. Do you still say that the jury in the Darcy case did not appear until June 7 in view of that record?

A. Yes. I do. I say they did not appear in the court room on the morning of June 1st.

Q. How do you know they did not appear in the court room on the morning of June 1st?

A. Because, sir, we were still trying the Foster-Zietz case and there was no jury panel appeared in that court room during that trial.

Q. Do you know whether any of the jurors appeared in that room, any at all?

A. Do you mean, do I know any came in and sat among the spectators?

Q. Yes, exactly.

A. No. I have no record of it.

Q. And the record shows that the jury for the Foster-Zietz trial appeared on June 1st?

A. No. This says they were summoned by the sheriff on that day.

Q. In the Darcy case; pardon me.

Isn't the language the same in the Foster-Zietz trial for the 24?

A. Yes.

Q. So reporting the incident of the 24th, it was reported in the same manner as June 1?

A. So far as this docket shows.

Q. And you have no recollection of where they appeared, how they appeared, and who saw them?

A. Yes. I have a very distinct recollection that they did not appear in the main court room.

Q. You were sitting at the counsel table?

A. That is right.

Q. There are three chairs at that table?

A. You are speaking of the Commonwealth's table?

Q. Yes.

A. Yes. There are three chairs there.

Q. And you would have your back, of course, to what would be (732) Judge Keller's right?

A. I would have my back to Judge Keller's right?

Q. Yes. You would be facing the jury?

A. That is right. The judge's bench was on my left.

Q. All right. What I meant to say; your back was in the opposite direction, but you were facing the jury; that explains it.

A. That is right.

Q. The body of the court room was to your right?

A. That is right.

Q. Every time somebody came into the court room did you take a peek to see who they were?

A. No.

Q. How do you know that any of the jurors came in there?

A. I didn't say that. I said that none of the jurors came in and sat in the place where they would sit when they were summoned for jury service.

Q. Will you tell me where this jury reported on June 1st?

JUDGE MURPHY: If they reported.

BY MR. MARGIOTTI:

Q. If they reported, and you know.

JUDGE MURPHY: I beg your pardon. Read the question.

MR. MARGIOTTI: I will withdraw it.

JUDGE MURPHY: Just reframe your question, if you will.

(733) MR. MARGIOTTI: I will withdraw the question.

JUDGE MURPHY: All right.

BY MR. MARGIOTTI:

Q. Will you tell me where this jury reported on June 1st, if they did report, and provided you know?

A. To my knowledge they did not report at all, sir. They certainly did not report in the main court room.

Q. When the main court room was occupied—strike that out. Didn't you tell the Pardon Board in my presence when I was arguing the case for Mr. Darcy that the jury reported about three weeks before and that they were excused and asked to return on June 7th?

A. I told you before, Mr. Margiotti, I have no recollection of saying that to the Pardon Board.

Q. Do you remember at the time you appeared before the Pardon Board there was a Secretary of the Pardon Board taking the speeches or the statements made by both counsel for the applicant as well as yourself?

A. I have no recollection of there being stenographic notes made of what was said.

Q. All right. Now, then, if this jury did report on June 1st would they have reported in any other section of that court house?

A. Well, they never did, sir. The practice is always, when the jury came in they came into the main court room where the (734) roll was called immediately after the court opened on the morning of their examination.

Q. In other words, it was natural for them to come into this room according to your regulation, but you say they did not come in that morning on June 1st?

A. I say they did not come into the court room on June 1st, and I would say that the matter of their coming in, that the jury would assemble in the jury room, that is, the men's jury room and the women's jury room.

JUDGE MURPHY: Just a moment.

MR. PANNELL: I was going to remove the book if he was through.

JUDGE MURPHY: But we are not going to have one counsel interrogate and then co-counsel interrogate. Give the witness' partial answer.

(Answer read.)

BY MR. MARGIOTTI:

Q. And when ——

JUDGE MURPHY: No. That is only a partial answer. Now, give the partial answer again, please.

(Answer read.)

THE WITNESS: (Continuing.) The men and women would each assemble in their respective jury rooms prior to the court, where there would be tipstaffs who would direct them what to do and immediately before 10 o'clock, a minute or two before, (735) they would be brought in as a body, the men and women would come into the court room at the same time, take seats in the section of the court

room reserved for the jury, which was immediately behind where the jury sat when the jury was chosen.

Q. That was the usual and customary way?

A. I never recall any other method being used.

Q. And in this particular case do you know whether the jurors on June 1st reported to the men's room, where the men's room is you said, and where the women congregated; do you know?

A. No jurors came into the jury room—or came into the court room on the morning of June 1st.

MR. MARGIOTTI: We ask that the answer be stricken and the witness answer the question.

JUDGE MURPHY: Motion denied.

BY MR. MARGIOTTI:

Q. I will ask the question again. Do you know whether these jurors on June 1st, the Darcy jurors, appeared in these jury rooms that you mentioned, one for men and one for women—appeared in there on the morning of June 1st? Yes, or no, do you know?

A. I am sure they did not, sir because if they did we would have known about it.

MR. MARGIOTTI: We ask that the answer be stricken from the record because it is an opinion only.

JUDGE MURPHY: We will let it stand.

(736) BY MR. MARGIOTTI:

Q. Do you know?

A. I wasn't in either of the jury rooms; no, sir.

Q. Will you please answer the question? Do you know?

A. I would not say definitely that I know that they did not appear. I would say that if they did appear I very—I am very sure we would have known about it, and we had no such knowledge.

Q. Do you know who advised this jury, the Darcy jury, to appear on June 7?

A. It has always been done by the sheriff or some member of the sheriff's office.

Q. Who was the sheriff at that time?

A. I think the name—Allen if I remember correctly.

Q. You have testified that you observed how the jurors were selected, is that right?

A. You are speaking of the selection of the Darcy jury now?

Q. Yes.

A. Yes, that is right.

Q. I think you said that they were called in one by one by one and examined on their voir dire, and if accepted they took their chairs?

A. That is right.

Q. Did that apply to the entire fourteen jurors?

A. Mr. Margiotti, since yesterday I have been trying to recall (737) just what that situation was. About that time —up to about that time the practice had been to select all of the jurors and have them, if they were selected, take their seat in the jury box and wait there until the full jury was assembled. Just about that time, whether it was at this trial, before or after, the practice was changed, and as the jurors were selected they were removed to a little anteroom across the court room where they waited until the full jury was assembled. In this case I am not positive as to which it was, but I think they were all chosen and stayed in the jury box, but it is somewhat of a guess.

Q. Is that your best recollection?

A. My best recollection is that I think they assembled in the box.

Q. And remained there until the alternates were completed?

A. Yes. That is my recollection.

Q. All right. Now, don't you know that the jurors in the Darcy case, so far as the record is concerned, shows that they did appear on June 1st, that they answered, and that a number of them were excused?

MR. VAN ARTSDALEN: If the Court please, I object to that question.

JUDGE MURPHY: May I see the book from which counsel purported to be reading?

MR. MARGIOTTI: I purported to read from Page 394.

(738) JUDGE MURPHY: May I see it, please?

MR. MARGIOTTI: Let me withdraw that question, Your Honor. I will reframe it.

JUDGE MURPHY: Well, withhold it one moment, please. What was the page counsel said, Mr. Hanover? (Addressing the court reporter.)

MR. MARGIOTTI: At the bottom of the page, Judge.

JUDGE MURPHY: You say you find that on Page 394, Mr. Margiotti?

MR. MARGIOTTI: About the jurors being excused.

JUDGE MURPHY: Were excused on June 1st?

MR. MARGIOTTI: That is my impression.

JUDGE MURPHY: If Page 393 and 394 have not been introduced in evidence, we direct that they be spelled out on the record at this point.

MR. MARGIOTTI: If Your Honor please, you will recall that they were introduced into evidence, and we asked leave to substitute photostats for those pages in order not to keep the entire record here.

JUDGE MURPHY: We direct that it be spelled out in the record at this point.

MR. MARGIOTTI: Well, spelled out means simply read it into the record what appears there, I assume. May I ask the Clerk to copy it?

(739) JUDGE MURPHY: The Court has given directions that it be spelled out.

(Page 393 of Relator's Exhibit No. 137 follows:

393

MAY TERM A. D. 1948

Bucks County, SS.

In the name and by the authority of the Commonwealth of Pennsylvania.

Honorable Hiram H. Keller, President of the Seventh Judicial District, consisting of the County of Bucks, by vir-

tue of said office, justice of the Courts of Quarter Sessions of the peace and oyer and terminer and general jail delivery, for the trial of capital and other offenses, in and for the said county.

To the Clerk of the Courts of Quarter Sessions of the peace, and oyer and terminer and general jail delivery of the County of Bucks, greeting:

We order and direct that you issue a venire to the Sheriff and Jury Commissioners of Bucks County, aforesaid, commanding the said Sheriff and Jury Commissioners to empanel, and the said Sheriff to summon, a traverse jury in the Courts of Quarter Sessions of the peace and oyer and terminer and general jail delivery, consistnig of 120 qualified according to law, to make up the jury requisite to inquire of and perform all those things (740) which on our part shall be enjoined upon them, at the term thereof to be held at Doylestown, in and for the County of Bucks, commencing on the 17 day of May A. D. 1948, next after the date of this precept, to serve for the term thereof commencing on the 1 day of June A. D. 1948, dated at Doylestown, this 12 day of April A. D. 1948.

Hiram H. Keller L. S.
President Judge
Calvin S. Boyer L. S.
Judge

1948 June 1—List of Traverse Jurors summoned by the Sheriff and returned to May Term of Criminal Court A. D. 1948.

1. Frances C. Ashworth
2. Edmund C. Anderson
3. Alvin Albrecht
4. Clarence G. Angeny
5. John Alcorn
6. J. Harper Atkinson
7. Dudley E. Bell
8. Anna W. Bucher
9. Ruth G. Bliss
10. Irene E. Blanchard
11. Florence Beck
12. John Barber
13. Maude C. Buckman
14. Virginia Brillman
15. Walter S. Berger
16. Marguerite Bergstresser
17. Charles A. Barndt
18. Charles G. Brodie
19. George Berner
20. Cathrine Bennett
21. Elwood W. Buck, Sr.
22. Elizabeth Stetson Barry
23. Fanny W. Benner
24. Anna E. Cole
25. James Court
26. Hugh P. Cassel

(741) 27. John J. Cole
28. Gladys A. Carnwath
29. Robert H. Clardendon
30. Dorothy M. Darrah
31. Gertrude Dixon
32. Erna M. Doane
33. Elizabeth G. Elville
34. Martin Frei
35. L. Calvin Fluck
36. Irene Frack
37. Joseph F. Ferry
38. John G. Ferguson
39. Alice S. Freed
40. Miriam W. Flory
41. Franklyn T. Fretz
42. Rachel L. Fox
43. Alleine C. Gardiner
44. Edward Green
45. H. Arthur Hellyer
46. Jesse H. Horne
47. Jsoehp S. Hetherington (sic)
48. Emily O. Higgenbottom
49. William F. Hickey
50. Joseph F. Hibbs
51. John E. Harrop
52. Ernest F. Hamm
53. Robert W. Hall
54. John M. Harding
55. John R. Hansbury
56. Marian Harm
57. Samuel L. Illick
58. James G. Jackson
59. Eva F. Kinsey.)

(Page 394 of Relator's Exhibit No. 137 follows:

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May Term A. D. 1948

60. Russell F. Kleinman
61. George H. Kerns
62. Clifton Leedom
63. Delbert Lynn
64. Joseph E. Lownes
65. Harold Lake
66. Oliver C. Landis
67. Mildred Lewis
68. Harold L. Loud
69. Everitt Miller

(742) 70. Roger Mason
71. Helen Virginia Mann
72. Charles L. Miller
73. Leonard Miller
74. Nicholas Mislan
75. Emily V. Maddux
76. R. Barclay Moon
77. Ethel G. Moyer
78. Elsie Markley
79. Stanley R. McKnight
80. Mary Mae Melchior
81. Ilse Milligan
82. William Mulloey
83. Elmer Ott
84. Francis M. Phillips
85. Howard Price
86. Elizabeth H. Prevost
87. Carlton A. Palmer
88. Norman B. Penrose
89. George P. Paxson
90. W. D. Pardoe
91. Ann L. Reed
92. Noah M. Rice
93. J. Alfred Rigby, Jr.
94. Frank Repetski
95. Mabel J. Rook
96. Velma A. Rosenberger
97. Edward J. Ryan
98. William S. V. Rodgers
99. William H. Slaughter
100. Lovada B. Schilichter
101. William Frank Sigley
102. Elva S. Shive
103. Ira M. Swartz
104. Jacob Shivo, Jr.
105. Anna K. Shaudys
106. John McLaren Strong
107. Mary E. Singley
108. Emma Shaddinger
109. Mabel Senderling
110. Mary Tyson
111. Wesley H. Talley
112. Marie R. Torongo
113. Alda L. Tettemer
114. Marvey M. Wismer
115. Amy P. Wurst
116. Marven D. Weidner
117. Peter Wichser

(743) 118. Harry T. Westlake
119. Doris C. Wilson
120. Harry W. Wambold.)

List of Traverse Jurors that were excused from the May Term of Criminal Court A. D. 1948:

Frances C. Ashworth; John Alcorn; Irene E. Blanchard; Florence Beck; Charles G. Brodie; George Berner; Cathrine Bennett; Elwood W. Bucks, Sr.; Elizabeth Stetson Barry; Fanny W. Benner; James Court; John J. Cole; Gladys A. Carnwath; Dorothy M. Darrah; Gertrude Dixon; Irene Frack; Joseph A. Ferry; Alice S. Freed; Edward Green; H. Arthur Hellyer; Joseph S. Hetherington; John M. Harding; Marian Harm; Mildred Lewis; Everitt Miller; Elsie Markley; Mary Mae Melchior; William Mulloy; Elizabeth H. Prevost; Mabel J. Rook; Edward J. Ryan; Anna K. Shaudys; John McLaren Strong; Mary Tyson; Marie R. Torongo; Alda L. Tettemer; Harvey M. Wismer; Amy P. Wurst; Peter Wichser.

Report of Grand Jury for May (sic) Sessions, 1948.

To the Honorable Judges of said court:

We, the Grand Jury of the May Sessions, 1948, of the Criminal Court beg leave to submit the following:

We had before us 22 bills of indictment of which 20 were true bills, 1 bill untrue and 1 bill #22 withdrawn by Mr. Curtin.)

BY MR. MARGIOTTI:

Q. Let me ask you this: Under the date of June 1st, 1948, if (744) it is not true that there appears in this record: Frances C. Ashworth; John Alcorn; Irene E. Blanchard; Florence Beck; Charlse G. Brodie; George Berner; Cathrine Bennett; Elwood W. Bucks, Sr.; Elizabeth Stetson Barry; Fanny W. Benner; James Court; John J. Cole; Gladys A. Carnwath; Dorothy M. Darrah; Gertrude Dixon;

Irene Frack; Joseph A. Ferry; Alice S. Freed; Edward Green; H. Arthur Hellyer; Joseph S. Hetherington; John M. Harding; Marian Harm; Mildred Lewis; Everitt Miller; Elsie Markley; Mary Mae Melchior; William Mulloy; Elizabeth H. Prevost; Mabel J. Rook; Edward J. Ryan; Anna K. Shaudys; John McLaren Strong; Mary Tyson; Marie R. Torongo; Alda L. Tettemer; Harvey M. Wismer; Amy P. Wurst; Peter Wichser?

A. Now, what is your question, sir?

Q. Doesn't that say that is a "List of Traverse Jurors that were excused from the May Term of Criminal Court A. D. 1948"?

A. Yes. That shows they were the jurors excused from that panel. It doesn't say when they were excused. I assume that they were excused much before that date by Judge Keller, which was the usual method.

Q. Do you not notice there is a date mentioned just before they were excused?

A. Yes.

Q. When?

(745) A. You are speaking of the minutes of June 1st, but that does not mean they were excused on June 1st. It says, when they were made, those minutes that those jurors had been excused.

Q. They could have been excused that day or sometime prior thereto, you mean?

A. They could have been excused that day, but most likely were excused sometime prior thereto.

MR. MARGIOTTI: Have I read enough in the record, Your Honor?

JUDGE MURPHY: You can read whatever you please.

MR. MARGIOTTI: You asked me to spell it out.

JUDGE MURPHY: I have directed the stenographer t spell it out, and it will be spelled out verbatim.

MR. MARGIOTTI: There is no question about tha We have offered it verbatim and it is in the record ver batim.

JUDGE MURPHY: May we get on, please?

MR. MARGIOTTI: We did that a long time ago.

BY MR. MARGIOTTI:

Q. Who fixes the dates for trials in the District Attorney' Office?

A. The District Attorney.

Q. Did you participate in that?

A. When I was Assistant District Attorney under Mr Biester, he would make the trial list, and I would go ove it with him. (746) He would ask for my suggestions. Th responsibility for fixing the days for cases to be listed wa the responsibility of the District Attorney, District Attor ney Biester.

Q. Did you know that the Foster-Zietz trial was fixed by the District Attorney for May 24, 1948?

A. Yes.

Q. Did you know that the Darcy trial was fixed for June 7 1948?

A. I knew that it was fixed to follow the week—the con clusion of the Foster-Zietz. We didn't know at that time how many days it would take to conclude the first two trials.

Q. When was it first determined previously or when the trial ended when was it first determined by the District Attorney that Darcy would be put on trial on June 7th?

JUDGE MURPHY: Will you read that question, Mr. Reporter?

(Question read.).

JUDGE MURPHY: All right.

THE WITNESS: District Attorney Biester made that decision. My recollection was that it was determined the latter part of the week of May 24 or very early in the week of June 1st, June 1st or 2nd, and at that time subpoenaes were sent out, or the people were notified. The witnesses were present. They were the same in both cases.

(747) BY MR. MARGIOTTI:

Q. Isn't it true that the determination was not reached until the end of the Foster-Zietz trial or close to the end of the Foster-Zietz trial? Just yes or no.

A. Well, it would be closer—if the decision was made on Friday or Monday, that was close to the end of the Foster-Zietz trial.

Q. Friday or Monday?

A. The end of the week of May 24 and Monday and Tuesday, June 1st or June 2nd.

Q. Mr. Curtin, I want you to read Relator's Exhibit 51, being a photostat of the front page of the Doylestown Daily Intelligencer (Handing), and I want you to state—well, read it, first.

A. Which part do you want me to read?

Q. Here is the part marked "Four Murder and Four Manslaughter Trials Listed".

JUDGE MURPHY: Will you give the date, please, for the record?

MR. MARGIOTTI: The date of the newspaper is May the 14th.

(Witness reads to himself.)

THE WITNESS: Yes.

BY MR. MARGIOTTI:

Q. Now, do you notice that the story—this is in evidence—(748) states that only two will be tried during the approaching term and the two others, David Darcy and Felix Capone, will be tried later?

JUDGE MURPHY: Read the question, Mr. Reporter?

(Question read.)

THE WITNESS: That is right. It says in this article that "Four murder cases are listed on the docket", that two will be tried—"but only two will be tried during the approaching term". That is what the paper says.

Q. Who gave the story that only two would be tried during that term?

A. I have no idea.

Q. Did you?

A. No.

Q. Did the District Attorney?

A. I don't know whether the District Attorney did or not. I would doubt it.

Q. Wasn't it a fact that it was so arranged that only two would be tried during that term?

A. That is not my recollection of what the arrangements were, sir.

Q. All right. I am going to call to your attention Relator's Exhibit No. 55, a photostat of the front page of the Doylestown (749) Daily Intelligencer, of Monday afternoon, May 24, and ask you to read the article or look at the article, "Feasterville Murder Case Defendants Go On Trial".

A. (Complying.) Yes.

Q. I ask you if this exhibit does not carry the story that Zietz and Foster were going on trial May 24?

A. Yes.

Q. And the other two defendants, David Darcy, 22, and Felix Capone, 16, will be tried at a later term of the court?

A. That is what the article says.

Q. All right. Did you give that story to the newspaper people?

A. No. I did not.

Q. Do you know whether Mr. Biester did?

A. I don't know whether Mr. Biester did or not. I didn't at any time I was there.

Q. Isn't it a fact that on May 24 you didn't know whether you were going to try Felix—Mr. Darcy at that term?

JUDGE MURPHY: Just a minute. Read the question.

(Question read.)

BY MR. MARGIOTTI:

Q. (Continuing.) Felix Capone and Mr. Darcy at that term?

JUDGE MURPHY: Do you understand the question?

THE WITNESS: Yes.

JUDGE MURPHY: What is the answer?

(750) THE WITNESS: Yes. At that time it was our intention to try first Zietz, then Foster, then Darcy. My recollection is we had no intention to dispose of the Capone case then because it was taking another week of court and we disposed of three cases, and the Capone case went to a later time because it was then our information that Capone wanted to plead guilty, sir.

Q. Isn't it a fact that you tried Foster and Zietz together and not separately?

A. They were tried together.

Q. That case, according to the docket entry, terminated on June 4.

A. It could be.

Q. And that was a Friday before Darcy went on trial?

A. Well, it that was Friday, that is probably ——

Q. All right. Do you know when it was that your office advised either counsel for Mr. Darcy or Mr. Darcy himself that he was to go on trial on Monday?

A. My recollection would be, sir, that it was early in the course of the Foster-Zietz trial, either Friday or Monday, that is, either Friday of the week of May 24 or Monday or Tuesday, June 1st or 2nd.

Q. And who did you notify?

A. Mr. Achey and I believe Mr. McBride, if I am not mistaken.

(751) Q. Did you notify the defendant?

A. Did we notify the defendant?

Q. Yes, sir.

A. I would presume that we did, sir. I personally ——

MR. MARGIOTTI: I ask it be stricken out.

JUDGE MURPHY: We will let it stand.

BY MR. MARGIOTTI:

Q. Why do you presume you did?

A. I have no independent recollection of notifying the defendant myself. My guess would be that somebody in the office did. I didn't.

MR. MARGIOTTI: We object to his guess.

JUDGE MURPHY: We will let it stand. When you ask "you", it is a collective "you". As I understand the question, it has two intimations, collective and individual, and it embraces all the forces of the District Attorney and the Commonwealth. We will let it stand.

MR. MARGIOTTI: What I am objecting to is the witness said "I am guessing".

JUDGE MURPHY: We will let it stand.

BY MR. MARGIOTTI:

Q. Do you know whether anybody in your office notified the defendant?

A. I do not.

(752) Q. Isn't it a fact that for the week of June 1st there was a graduation exercise scheduled in that court room for your high school?

A. I have no recollection of that, sir.

Q. Isn't it a fact that that graduation exercise was postponed so far as the court room was concerned?

MR. VAN ARTSDALEN: If Your Honor please, I object to the form of the question. The witness said he has no recollection.

JUDGE MURPHY: Just read the first question first. We are not going to be rushed. All right. Now, read the first question, Mr. Reporter.

(Question read as follows:

"Q. Isn't it a fact that for the week of June 1st there was a graduation exercise scheduled in that court room for your high school?"

Answer read as follows:

"A. I have no recollection of that, sir.")

JUDGE MURPHY: Will you please read the second question.

(Question read as follows:

"Q. Isn't it a fact that the graduation exercise was postponed so far as the court room was concerned?")

JUDGE MURPHY: The objection is overruled.

(753) THE WITNESS: I know nothing about the graduation exercises. I have no recollection of them at all, sir —of those exercises.

BY MR. MARGIOTTI:

Q. Up until that year isn't it a fact that the high school exercises—graduation exercises were held in that court room?

A. I don't know, Mr. Margiotti, where the Doylestown High School had their graduation exercises. I live in Morrisville and I have no interest in the Doylestown school system.

Q. Did you know of it being held there at any time?

A. I do not, sir. It may or may not be. I know nothing about where they held their graduation exercises.

Q. Did you know that the Foster-Zietz trial—strike that, please.

Did you know that the evidence and the proceedings generally of the Foster-Zietz trial were publicized daily in the Doylestown Daily Intelligencer?

A. There was a lot of publicity of it in the Doylestown Intelligencer, yes.

Q. Do you know that the newspapers of that county did the same thing?

A. I believe there were articles in other newspapers in the country, yes.

Q. Do you know that in many instances the Doylestown paper (754) had carried Q-A's, questions and answers?

A. I don't recall all the articles, sir, and what was in them. I know there was publicity about the trial—both of them.

Q. Did you know that the radio carried news comments on the trial?

A. I believe I did hear that, yes. I didn't hear them. I do not know what was in them. Yes. I believe that was the only station I heard that did that, was a small county station.

Q. All right.

A. I don't think any of the larger stations carried any news items.

Q. Did you at any time as the District Attorney of that county make application to the Court to postpone or to fix the trial—the Darcy trial for a later date?

A. I wasn't the District Attorney.

Q. As assistant?

A. I made no such petition.

Q. Do you know whether Mr. Riester did as District Attorney?

A. I do not think—I do not know whether he did or not

Q. Do you know whether he did?

A. Whether he did make application?

Q. Yes.

A. To do what?

Q. To have the case put off for a week or two or three?

(755) A. I know of no application was filed by the District Attorney, and I know none was filed by myself.

Q. I want you to look at Relator's Exhibit No. 93 and particularly the last item under "We noticed * * *."

JUDGE MURPHY: Let me say for the record at this point, in view of the objections this morning to the Court's question, if the District Attorney or the Assistant District Attorney had done that, there would be a nice constitutional issue that the trial had been interfered with, as has been challenged here in court.

MR. MARGIOTTI: I don't think so. Your Honor has a right to think ——

THE COURT: The observation is in the record at this point.

MR. MARGIOTTI: My observation is that the District Attorney is as much the counsel for the defense as he is for the Commonwealth; and our contention is right along that they should have made an application for continuance themselves, of their own motion.

JUDGE MURPHY: There is an objection to the Court asking a question. It is in the record.

THE WITNESS: I have read it.

BY MR. MARGIOTTI:

Q. And that article says: "In a Philadelphia newspaper column (756) the following excerpt: 'So many murder trials are cluttering the Bucks county criminal docket that Doylestown High School graduates won't be able to hold their commencement exercises in the ancient court house. Instead they will be graduated outdoors.'"

Was that called to your attention during the trial?

A. No, it was not. It is rather surprising to me because, I mean, if that is true, there were not many night sessions.

Q. This article is ——

JUDGE MURPHY: Read the witness' answer. I did not hear it.

MR. MARGIOTTI: I beg your pardon, Your Honor. I thought he was through.

JUDGE MURPHY: Of course, we are going at a rapid speed this morning unlike all the other sessions in this case. It may be that you are unduly enthusiastic today but it is bad on the blood pressure. We only have so long to live and we are not going to be rushed, and there is a tenseness and an atmosphere of rushing in this court room this morning.

MR. MARGIOTTI: I do not want to rush anybody.

JUDGE MURPHY: It is the atmosphere we are referring to.

MR. MARGIOTTI: I have been rushed a little bit in the past, too, by some of my own people.

(757) JUDGE MURPHY: Now, Mr. Reporter, read the question and answer before the colloquy.

(Record read.)

BY MR. MARGIOTTI:

Q. Is this the first time you have seen that particular article that I have just called to your attention?

A. I would hesitate to say yes or no to that, Mr. Margiotti. I don't know.

Q. Now, Mr. Curtin ——

A. Excuse me, Mr. Margiotti. Could I say something? While I have been sitting here waiting, I was trying to go over in my mind when we notified Mr. Achey and Mr. McBride about the Darcy trial, and I am quite sure that a letter was sent to Mr. Achey at the same time all the cases were listed at the start of the trial term, a week before, setting forth that he would start the week after the Foster-Zietz trial was concluded.

Q. Do you have a copy of the notice you sent out?

A. I haven't it here. I am just trying to go over in my mind what happened in response to your question.

Q. Will you please tell me whether or not a copy exists of that notice?

A. I am not positive a written communcaition or a phone call, but the attorneys were notified of all cases on trial, and I am sure that Achey was notified with others when the Darcy trial (758) would be heard.

Q. Now, do you remember seeing an article in the Evening Bulletin—this is not in evidence—but I am asking you this question: As of June 3, 1948, an article which read, "Two in murder trial offer no defense"?

A. I read a number of newspaper articles. Whether I read that one or not I have no recollection, Mr. Margiotti.

Q. The article stated, "Crows"——

MR. VAN ARTSDALEN: If the Court please, we will object to the form of the question.

JUDGE MURPHY: Sustained. The best way is to put the article in evidence.

MR. MARGIOTTI: This is for the purpose of cross-examination, and we propose to introduce the article, but he says he knows nothing about it. I am calling it to his attention, if Your Honor please, and later on introduce it. I have said it is not in evidence.

JUDGE MURPHY: Read the partial question, Mr. Reporter.

(Record read.)

JUDGE MURPHY: It is assuming a fact not in evidence.

BY MR. MARGIOTTI:

Q. Isn't it a fact at the end of the Foster-Zietz trial—just a minute. I withdraw the question.

(759) JUDGE MURPHY: We would be glad to have the article offered in evidence.

MR. MARGIOTTI: I see here something that may be better than the article.

BY MR. MARGIOTTI:

Q. Isn't it true that the Foster-Zietz trial, at the end

Judge Boyer said just before the summations to the jury, "Well, we are going to get through faster than we anticipated, and if we get through in time we will start the Darcy trial Monday"—Judge Boyer?

A. I don't recall Judge Boyer saying that. If he did it would certainly show in the notes of testimony.

Q. You don't remember that?

A. I don't remember that.

Q. All right. Did you have any extra tables in the court room during the trial?

A. We did not.

Q. Where was the paraphernalia for the ballistics expert kept?

A. Where was it kept?

Q. Yes.

A. He had it himself, sir, until it was introduced into evidence.

Q. Before he introduced it, was it on the table?

A. What do you mean, the guns or the charts?

(760) Q. Everything that he had there.

A. Things that the ballistics expert—some of the things he had were the gun, the slugs, and the cartridge cases. They were—we got them from him when in the course of the trial we reached the point of the trial, and we had them numbered. The other information, such as pictures that he had made through the comparison microscope and things like that, he kept in his own brief case until he was called into the trial, when they were given a number and were introduced and then used.

Q. Were they put on a table?

A. After they were introduced they were put on a table

Q. But not before?

A. No.

Q. The tables they were put on, what tables were they?

JUDGE MURPHY: Just a minute. Read the partial answer of this witness.

(Answer read as follows: "A. After they were introduced they were put on a table.")

JUDGE MURPHY: The Court heard him say "Nothing", and then Mr. Margiotti interrupted with a question.

MR. MARGIOTTI: I thought, Your Honor, he was through.

JUDGE MURPHY: Read the previous question.

BY MR. MARGIOTTI:

(761) Q. Were you through?
A. I was starting to finish the answer.
Q. Go ahead and finish whatever you wanted to finish.

JUDGE MURPHY: No. Read the question, Mr. Reporter. Let us have the stenographic record in order.

(Question read as follows: "Q. Were they put on a table?")

THE WITNESS: Nothing was placed on the Commonwealth's table, where all the exhibits eventually were, until after they were offered in the evidence.

BY MR. MARGIOTTI:

Q: Which of those chairs at the Commonwealth table did you occupy?

A. The middle one.

Q. As a general proposition?

A. The middle one.

Q. And which one did Mr. Biester occupy?

A. Mr. Biester sat to my left.

MR. MARGIOTTI: When I call him Mr. Biester, You Honor, it is not out of disrespect. I know he is a judge. I call him that because he was a District Attorney at that time.

BY MR. MARGIOTTI:

Q. And then he was ahead of y[illegible] so far as the bench was concerned?

(762) A. He wasn't ahead of me. He was to my left.

Q. He was between you and the bench?

A. That is right.

Q. Then did you occupy those positions generally throughout the trial?

A. Yes.

Q. And you would be facing the jury generally throughout the trial?

A. That is right.

Q. Now, you were asked whether or not you saw any magazines or newspapers in the court room?

A. That is right.

Q. Of course, you did not look back to see whether there were any magazines in that court room?

A. I didn't make a periodic inspection for magazines and newspapers because there were none there, Sir.

Q. Did you look back?

A. Mr. Margiotti, if there had been any magazines or newspapers into the court room we would have known it

because the tipstaff certainly would have done something about it.

Q. I am asking you, did you yourself look back?

A. I occasionally looked to my side and in front of me, and in that position I could see half of the court room, and I saw no magazines or newspapers during court, and when I went (763) in and out of the court room during recesses I saw no magazines or newspapers in any other parts of the court room.

Q. Which half of the court room?

A. I could see everything as you come into the court room from the main door to the rear; I can see all parts of the court room which would be on the right-hand side of the center aisle.

Q. Do you say that there were no magazines or you did not see any?

A. I say I did not see any.

Q. All right. Now, do you know how many reporters were at the reporters' table?

A. Not many. The Doylestown paper had a reporter there, and that reporter customarily acts as an asspciate reporter for the Philadelphia metropolitan papers. So that there would be one and sometimes two reporters from the Doylestown Intelligencer there all the time, and occasionally there was one other reporter there, and I believe on one or two occasions a third—two from the metropolitan papers, not all the time, but for a short period of time.

Q. Where did they sit?

A. At the reporters' table.

Q. And were they facing the jury?

A. Yes. They were.

(764) Q. Did the reporters occupy the chairs nearest to you or furthest away from you?

A. The reporters occupied the chairs in back of the re-

porters' table so that they could write on the table immediately in front of them.

Q. In other words, the table in front of them would be between you and them?

A. That's right.

Q. And these reporters would be facing the same way you were facing?

A. That is right.

Q. They would be looking at your back?

A. That is right.

Q. Now, do you—now, I understood you to say yesterday, and it may be my mistake, but you testified that no one was seated at the reporters' table?

A. If I said that I didn't mean that. There were people seated at the reporters' table. They were reporters. They would come in one, two, or three, as the case may be, and occasionally if those chairs weren't completely occupied some of the attorneys would be seated in those chairs.

Q. I understand. Now, then, how do you remember where you were seated on Friday night?

A. Because on Friday night I spent most of that session reading (765) off the confession to the jury, which was a very long confession as I recall, twenty some odd pages.

Q. How long—approximately how long did it take you to read that confession to the jury? That was Exhibit 19, I think it was.

A. I don't know the number.

Q. Well, now, the confession ——

A. About half an hour as I recall it.

JUDGE MURPHY: Just for the record, there is no number in this court, and you are referring to the confession number in the county court, I take it.

MR. MARGIOTTI: That is right.

JUDGE MURPHY: All right. So the record will not be confused read Mr. Margiotti's partion question, if you will, please.

(Record read.)

BY MR. MARGIOTTI:

Q. And during the time you read this confession did you read it slowly and distinctly, so that the jury could follow the import of the confession?

A. I did, indeed, sir.

Q. And during that time your attention was on what you were reading?

A. That is correct.

Q. And you were facing the jury?

(766) A. That is right.

Q. And your back would be to where this chair appears, marked Judge Boyer?

A. That is right.

Q. In that section of the court room?

A. That is right.

Q. Of course, you do not mean to tell where any particular person was in that section of the court room?

A. During that period of time?

Q. During the period you were reading to the jury?

A. That is correct.

Q. You do not know where Mr. Biester was at that time —now His Honor, Judge Biester?

A. During that thirty minutes?

Q. Yes.

A. Or approximately thirty. It may have been longer.

He was seated alongside of me in his usual chair for a few minutes, as I recall, and then he got up. Now where he went I don't know.

Q. And you continued to read?

A. That is right.

Q. Now, you said you remember Judge Boyer appearing on the bench?

A. That is right.

Q. How many days do you remember of the Darcy trial that he (767) appeared on the bench with Judge Keller?

A. Well, sir, as I said yesterday, he came in every morning when court opened, and then we were having some other criminal matters disposed of, so that Judge Boyer was conducting court in another court room, so that for one, two, or three days of that week he wasn't around the main court room at all, as I recall, because he was occupied in another court room. It is my recollection that he didn't—wasn't free from his duties in another court until about—my best recollection is about Thursday of that week. Then I believe he did come and sat on the bench on a few occations. My thought was that he didn't sit there at all after there was a sidebar conference. My thought was that that occurred about two days after the actual taking of testimony which would have been about Thursday. It could have been later because it was Thursday before he was really free from his other duties, but he walked up and sat alongside of Judge Keller, oh, only to the best of my recollection two or three times for short intervals before the sidebar conference, and after that not at all.

Q. Well, so that we get this correct, during the entire trial of course the Court convened every morning?

A. That is right.

Q. How many times at the convening of court did Judge Boyer appear with Judge Keller on the bench?

A. He came every morning at the convening of court except (768) Saturday. I am not sure that he was there on Saturday morning. I don't know. I don't think he was there for the convening of court on Saturday morning, but he was the other five days, and the Monday following.

Q. You say he appeared at the convening of court, and was there any business done before the two judges after convening court other than the Darcy trial?

A. My recollection is that there were some very—on the Monday there was quite a bit of miscellaneous business.

Q. The first day?

A. Yes. My recollection is the rest of the week there would be maybe one or two papers presented by some attorney in the miscellaneous court.

Q. When the papers are presented are they given a date of presentation?

A. You mean when attorneys' papers are presented?

Q. Yes.

A. They normally are.

Q. And who keeps those papers?

A. It depends in what court they are. If the Orphans Court they would go in the Orphans Court; in the Quarter Sessions Court they would go in the Quarter Sessions.

Q. Well, now ——

MR. VAN ARTSDALEN: I don't think the witness (769-770) finished his answer.

JUDGE MURPHY: The Court's recollection was that in the midst of his answer counsel began another question.

THE WITNESS: If it is a Common Pleas matter it would go to the Prothonotary's Office.

BY MR. MARGIOTTI:

Q. Do you know of any attorney who presented any motion or a petition or any other matter for the consideration of the Court after Monday morning?

A. I have absolutely no recollection of any individual lawyers or any papers that were presented, sir.

Q. Have you made any search of the various records in your county to ascertain whether there are any such papers?

A. No. I have not.

JUDGE MURPHY: I might just suggest for the benefit of counsel on either side, if you examine that envelope you will find a matter referred to in the minutes in the yellow sheet.

BY MR. MARGIOTTI:

Q. Do you know how long Judge Boyer remained on the bench each morning?

A. Until the miscellaneous business was concluded. I don't know just how many minutes that was on each morning.

Q. Do you know whether he remained any longer than the conclusion of the miscellaneous business?

(771) A. He may have for the latter part of the week.

Q. During the latter part of the week?

A. Yes. After he finished his criminal work in other courts.

Q. He had some criminal work to finish himself?

A. We had a number of other matters that were completed that week, yes.

Q. Where did he hold court?

A. In another section of the court room.

Q. In the Grand Jury Room?

A. What we call the Grand Jury Room.

Q. During the time he sat on the bench, during the entire time that he was on the bench did he participate in discussions or collaborations with Judge Keller?

A. He may have had some whispered conversations with Judge Keller. I don't know. I don't know that he did not say anything that could be heard by us. I mean, he took no active—active participations in the trial at all.

Q. You say he may have had some whispered conversations. Your memory is not definite?

A. That is right.

Q. Did he or did he not to the best of your knowledge?

A. Whether they leaned over and said something to one another during any periods they were sitting there, I don't know. I have no definite recollection of it occurring but it could have.

(772) JUDGE MURPHY: The question is: Do you have a definite recollection that they did in fact?

THE WITNESS: I have not, sir.

JUDGE MURPHY: All right.

BY MR. MARGIOTTI:

Q. Do you have any recollection of a sidebar conference which was engaged in between Judge Boyer and Mr. Achey?

A. I have a recollection of a sidebar conference which I have mentioned before, Mr. Margiotti, where both Mr. Achey and the District Attorney Biester went to sidebar and had some conversation with Judge Keller, and I be-

lieve Judge Boyer interjected something. Then there was a further conversation between Mr. Achey and Judge Boyer at sidebar which I, seated at the defendant's table, could not hear.

Q. The Commonwealth table?

A. I am sorry. At the Commonwealth's table that I could not hear.

Q. We would not mind sitting you at the defendant's table. Now, just a minute. On the occasion that the judge was on the bench, that is, Judge Boyer, and prior to the sidebar conference, will you indicate how long Judge Boyer had been sitting on the bench?

A. You mean the occasion which concluded with a sidebar conference?

(773) Q. I don't know whether it concluded with that—in which that occurred?

A. My best estimate would be about twenty minutes.

Q. Was that in the afternoon or in the morning?

A. I think that was in the morning, sir.

Q. Was that twenty minutes after court convened or was it—or did some time elapse between the convening of court and the beginning of the twenty minutes?

A. My recollection is that it was sometime after court convened. I don't think that Judge Boyer on that occasion was on there continuously from the time that court convened until it occurred.

Q. Do you know where the judge came from?

A. Out of the Judge's Chambers.

Q. That would be to the right of Judge Keller?

A. That is right, through that door that led into the Judge's Chambers.

Q. And he walked up on the bench?

A. That is right.

Q. Had anybody sent for him?

A. I have no recollection of anybody sending for him.

Q. Did I understand you to say that thereafter some agreement was made about the appearance of Judge Boyer?

A. No. I said nothing about any agreement, sir.

(774) Q. I didn't think you did, but somebody associated with me said that to me and tha' is the reason I am asking the qusetion. I did not mean to intimate that you did either.

JUDGE MURPHY: We recall the testimony of the witness that there was objection to his being there and he did not come on the bench thereafter.

MR. MARGIOTTI: That is my recollection too, Your Honor.

JUDGE MURPHY: As I understand it, the record shows the objection and shows the colloquy.

MR. MARGIOTTI: Shows the what?

JUDGE MURPHY: The colloquy.

MR. MARGIOTTI: Oh, sure. Judge, can we have our morning recess now?

JUDGE MURPHY: We will take a ten-minute recess.

(Recess taken.)

(David Darcy present in person.)

BY MR. MARGIOTTI:

Q. Do you remember where you were when the Judge delivered his charge?

A. My recollection is, sir, that I was sitting with Judge Biester in one of the two chairs in the two rows of chairs that are immediately in front of the reporters' table, in the first of those two rows of chairs, in the front of those two rows.

(775) Q. I am showing you Relator's Exhibit No. 135. Could you indicate on that exhibit where you were seated?

A. Yes. My recollection is that I was seated in either this chair, being the third chair in from the bench in the front row, or the second chair, and Judge Beister as I recall was alongside of me to my left.

Q. In other words, you were in front of the reporters' desk?

A. That is right.

Q. Now, why did you leave the Commonwealth's table during the charge?

A. Sir, we followed the practice that we always do, moving back from the table where you can stretch and move around a little bit rather than sitting right up in front of the jury.

Q. I see. When Judge Keller delivered his charge, where was he seated?

A. He was seated in the chair nearest the witness box on the bench where he sat through the trial.

Q. That is right, and that would be closer to the Commonwealth's table than where you were seated during the charge?

A. You mean Judge Keller would be seated closer to the Commonwealth's table than I was seated at the time of the charge?

Q. No. Than you were seated—Judge Keller would be closer to the Commonwealth's table than he would be to you and to Mr. Biester?

(776) A. That is true.

Q. Did you know who was behind you?

A. I have no recollection of anyone being behind us, sir.

Q. Do you have any recollection of looking to find out who was behind you?

A. I have no recollection of looking around to see who was behind us. I am quite sure there were no reporters at the table during the charge of the Court.

Q. I have in mind particularly whether there was—whether you know that any person or persons were occupying those chairs that were immediately in front of the spectators' benches; do you remember?

A. I have no recollection of anyone being in those chairs, sir.

Q. Do you have any recollection of looking for that purpose?

A. No. I did not look for that purpose.

Q. Did you see Judge Boyer during the charge?

A. I have no recollection of seeing Judge Boyer at all during the charge of Judge Keller in that case.

Q. Now, on the question of the charge do you remember where you were toward the end of that charge?

A. I was in the same place throughout the charge, sir, as I recall it.

Q. Do you remember any part of the charge toward the end?

A. I am not sure what you mean. What do you mean, do you (777) remember any part? Do I remember what Judge Keller said?

Q. Yes.

A. I don't remember his words, I know at the end there is the usual question of counsel as to whether they have anything to add.

Q. Do you remember Judge Keller saying, "Have I overlooked anything? Are there any corrections to be made?"

A. Yes. I remember that.

Q. And Mr. Achey said, "Nothing for the defendant, Your Honor"?

A. That's right.

Q. Now, neither you or Mr. Biester said anything then, did you or did you?

A. District Attorney Beister said something at the conclusion of Judge Keller's charge.

Q. No. I am talking about immediately after Mr. Achey said, "Nothing for the defendant, Your Honor", immediately after that.

A. Well, my recollection is that Judge Keller then said a few more words, and then Judge Biester said something or made some correction or suggestion that something may have been overlooked, or something of that nature.

Q. Well, to refresh your memory the Court said: (Reading) "Members of the Jury: In conclusion I have instructed you as to what I understand to be the law bearing on all the questions arising in this case, as well as the substance of the testimony (778) bearing on the shooting as I recall it. I trust I have made myself clear and that I have succeeded in giving it to you so that you comprehend and understand it. What does it indicate to your minds as jurors? I may add that in the rendition of your verdict, if you convict this defendant of murder in the first degree, then you will not only have to announce the verdict, but also announce the punishment, what the punishment shall be."

Do you remember the Judge saying that?

A. I remember language like that, yes.

Q. All that took place after the Judge said, "Have I overlooked anything or are there any corrections?"

A. If that is what the record says, I agree with it.

Q. It was thereafter that Judge Biester—at that time Mr. Biester was District Attorney—made some statement to the Court, is that right?

A. Well, that is my recollection that after Mr. Achey said that the Court said something further, and then Judge Biester said something.

Q. All right. How did Judge Biester—where was Judge Biester standing when he addressed the Court?.

A. Before the bar, the railing immediately ——

Q. Like this bench is here, right in front of the Judge?

A. Yes.

Q. Is that right?

(779-780) A. That is right.

Q. And when did he move over there?

A. Well, he got up from—as I recall it, he got up from where he was seated alongside of me and stepped forward maybe three, four feet and he was right there.

Q. Do you mean to say there was only three or four feet from where he was seated to the position he assumed in addressing the Court or trying to get the Court's attention?

A. At that time, yes. He moved right over to that railing immediately in front, and from where he was seated it was only three or four feet.

Q. And that would be the end of it?

A. No. It would be about two-thirds of the way down from the one end. No, just a little beyond the middle I would say; just a little beyond the middle.

Q. He went a little beyond the middle of the bench and faced Judge Keller?

A. Well, he stepped—he stood up from where he was sitting and walked over to that spot which put him just a little beyond the middle from it to the end of that bench.

Q. Did he stand there for any time before he was recognized by the Court?

A. Now, my recollection as to that, sir, is that there was maybe a minute or two until Judge Keller had completed whatever (781) he was saying and then when he had

stopped then Judge Beister, the District Attorney Biester made some suggestions.

Q. Made some suggestions, and do you remember what he said?

A. I am sorry, sir. I don't remember his words. Again it is my recollection that he asked the Court—thought that the Court had overlooked and asked to charge or something, but I could be wrong on that.

Q. Will you state whether or not you and the District Attorney conferred before he went to the bench to attract the attention of the Court?

A. It is my recollection that we did, sir, in whispers because throughout the charge we were whispering back and forth, yes.

Q. Do you remember what you talked about?

A. No. I do not. We would comment on the features of the Judge's charge as he delivered it, but just what those comments were I don't remember.

Q. Was anything said concerning calling certain matters to the Judge's attention?

A. Again it is my recollection before Judge Biester got up we had discussed something we felt the Court had overlooked, and as a result of that Judge Biester did get up.

Q. Do you remember what you thought the Court had overlooked in its charge?

A. I have no idea what that particular feature was.

(782). Q. Did you discuss with Judge Beister—at that time the District Attorney of your county—any question concerning the burden of proof?

A. I said, Mr. Margiotti, I don't remember what we whispered about between ourselves during that or immediately before he got up and addressed the Court. I haven't any recollection of what, but we talked about something.

Q. Judge Beister also took a position back in that section of the court room during trials?

A. You mean he would sit back there? No, not . . .

JUDGE MURPHY: Just a minute, please. Where is back there?

MR. MARGIOTTI: Back where he was seated at this time according to the witness, which he said was in front of the newspaper reporters' table.

THE COURT: Read the question as supplemented?

(Record read.)

THE WITNESS: No. He didn't because he was actively trying the case. The only times that he left the Commonwealth's table as I recall—of course, he wasn't there during recesses but during the actual trial, during the time that I was reading the confession, and during the charge of the Court; during the rest of the time he was actively engaged in examining the witnesses.

(783) BY MR. MARGIOTTI:

Q. As a general proposition did you see the chair or the—with an inscription in front of it in Relator's Exhibit 135, marked "Judge Boyer"?

A. What do you mean did I see the chair?

Q. Did you see it in the exhibit?

A. Yes.

Q. Did Mr. Biester at that time have a habit of occupying chairs back there where that is, where that inscription is?

A. During the trial?

Q. During any time—during the trial?

A. During the trial if ——

JUDGE MURPHY: Just a minute. Which question are you asking?

Q. During the trial.

A. During the trial he didn't sit to the best of my recollection.

Q. Well, during the charges?

A. During the charge there was only one—during the charge he sat where I told you.

Q. I am talking about generally speaking during the charges?

A. You mean in other cases?

MR. VAN ARTSDALEN: If the Court please, I object. I object to the question.

(784) JUDGE MURPHY: We will take it. The question is: At any time during a charge in some other case or cases do you recall Judge Biester, who was the trial lawyer, sitting back in a seat marked Judge Boyer on the exhibit on the table, not before the witness?

MR. MARGIOTTI: That is right. That is the question.

THE WITNESS: I wouldn't know. I would suppose sometime in the course of some trial he may have sat in one of those chairs. I don't have any recollection of it, but it could happen.

Q. Did you hear what Judge Biester said to Judge Keller?

A. You mean when he got up and made the remark that I have mentioned?

Q. Yes.

A. I heard it at the time but I don't recall the exact phraseology at this time.

Q. Did he talk more than once or was it one continuous statement?

A. As to that, Mr. Margiotti, I don't know. It could have been that Judge Keller answered him and then he answered Judge Keller. Whether it was one statement or not I don't know. I wouldn't want to say.

Q. Now, when Mr. Achey objected to Judge Boyer's sitting on (785) this case, do you remember Judge Boyer saying that judges reserve the right to confer without being obligated to get the consent of the defense counsel?

A. As I explained to you, Mr. Margiotti, I wasn't at sidebar, and from where I was sitting we could not hear what was said.

Q. I see. All right.

A. But I only know what Judge Biester told me and what I later read in the record.

Q. Do you know whether or not, after that objection was made, whether Judge Boyer immediately left the bench or whether he remained there for a while?

A. My recollection is, sir, that he did remain there for some short time thereafter, a few minutes; not too long; five, ten minutes perhaps.

Q. Didn't he remain until almost the close of that session?

A. He could have because I am not too sure how late in the morning it was, and I think it was in the morning that that occurred.

Q. I see. All right. Were you present in court after the Foster-Zietz trial?

A. How long after?

Q. Oh, I would say within a half hour.

A. I was present in court. You mean after the verdict was brought in or at the conclusion of the charge, or what?

(786) Q. After the verdict.

A. Yes.

Q. Did you see the newspaper which quoted Judge Boyer as commending the jury on its verdict?

A. Did I see the reporters?

Q. Did you see the newspapers?

A. I may have read the Intelligencer's account of that--account of the bringing in of the verdict. I don't remember what was in it.

Q. I was trying to shorten it, but I think I will try to get the paper. I call your attention to Relator's Exhibit 78, and particularly to the story that appears on the right-hand side: "Judge Boyer Praises Jury For Verdict Condemning 2 Killers To Electric Chair." (Handing.) Did you see that story?

A. I believe I did.

Q. Did you see it the day that paper was issued which I understand was Saturday, June 5?

A. I think so, that I probably saw it the following Monday morning. We took the Intelligencer, and it was sent to our Morrisville office, and we generally got it to the next morning after it was published.

Q. Were you in court or were you present at any time when such a statement was made by Judge Boyer?

A. I was in court when the jury came in, and I was in court (787) until the jury was excused. I was, however, quite busy at that time to make sure that we had all the exhibits in such shape so that we could use it for the next trial, checking the exhibits. I probably went into the jury room to see if there were any there. So I probably went in

and out of the door at that time. I have no definite recollection of Judge Boyer talking to the jury afterwards.

Q. Well, have you any recollection, definite or otherwise?

A. Yes. He talked to the jury.

Q. What did he say to the jury?

A. That I do not know because I say I was in and out and I was gathering up the exhibits. I was quite busy because I knew it was very important that they were in good shape for the following trial.

Q. Who was in good shape?

A. The exhibits we had, to be good for the trial that was going to follow.

MR. MARGIOTTI: If the Court please, I am through with the cross-examination except that I would like to have the witness remain for something else that I would like to ask him about. I do not have the papers here, and I would prefer not to ask the questions unless I have the papers before me.

JUDGE MURPHY: I understand that cross-examination is concluded, and Mr. Curtin, you are requested to remain a bit (788) longer.

MR. MARGIOTTI: He does not mind to be up here.

THE WITNESS: I have other places I would rather be than here.

RE-DIRECT EXAMINATION

BY MR. VAN ARTSDALEN:

Q. Mr. Curtin, do you know whether or not when a juror is excused, whether that juror must appear in open court?

A. No. The practice in Bucks County is that the persons desiring to be excused get in touch generally by letter with Judge Keller, who is the only one who excuses jurors, and that is during any time from the time they receive their original summons up until the time they appear. Then it is Judge Keller's practice to have a letter sent to those people telling them they are excused or not excused, and if they are excused they do not appear in court at all.

Q. You have stated, I believe, that Raymond Allen was the sheriff of Bucks County at the time of the Darcy trial. Do you know where Mr. Allen is at the present time?

A. No. I don't.

Q. Is he any longer the sheriff of Bucks County?

A. No. He is no longer the sheriff of Bucks County.

Q. Who was the Deputy Sheriff?

A. Harry Knox.

(789-90) Q. Where is he?

A. Harry Knox suffered a series of severe strokes, and is mentally incapacitated—mentally and physically.

Q. Mr. Curtin, your attention is called to an article appearing in the Intelligencer of May 14. Do you have any knowledge of anyone giving that story to the paper?

A. Which article is that, sir?

Q. I refer to Relator's Exhibits 51 and 52. (handing)

A. I am not sure what you want to direct my attention to on 52, Mr. Van Artsdalen.

Q. Well, Relator's Exhibit 52 is really a continuation of the article that appears in Relator's 51, is that correct, sir?

A. That is correct. I have no knowledge where they got the information that shows in that newspaper article. I didn't give it to them.

Q. Mr. Curtin, you stated that in the sidebar conference you indicated your position. Can you state whether you were closer to the place where that sidebar conference took place than any members of the jury were?

A. I would say that my position was just about the same distance from the—where that conversation took place as juror No. 1, and Juror No. 1 would be the juror nearest me. The two of us were about equidistant from where Mr. Achey and District (791) Attorney Diester was standing in front between Judge Keller and Judge Boyer.

MR. VAN ARTSDALEN: That is all, sir.

RE-CROSS EXAMINATION.

BY MR. MARGIOTTI:

Q. Just a minute, Mr. Curtin. The District Attorney has called your attention to an article of May 14. When did that first come to your attention?

A. The article?

Q. Yes.

A. I would say that that paper would be delivered to my office in Morrisville or come through the mail the following day.

Q. The following day. Did you read the article?

A. I probably saw it.

Q. Did you call the Doylestown Intelligencer to correct it?

A. No.

Q. What is that?

A. No.

Q. Did you do anything to correct the impression made in that article?

A. No.

MR. MARGIOTTI: That is all.

RE-DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN:

(792) Q. May I ask one other question, Mr. Curtin? Had you had occasion prior to that to observe inaccuracies by reporters of newspapers?

A. Yes.

Q. Did you ever call the attention of those facts or inaccuracies to the reporter?

A. No. We did not.

MR. VAN ARTSDALEN: Yes. That is all.

(Witness excused.)

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(793) ERNEST M. LEEDOM, called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Leedom, where do you reside?

A. Southampton, Pennsylvania.

Q. What is your occupation?

A. Deputy Controller of Bucks County.

Q. Southampton, is that in Bucks County?

A. Yes, sir.

Q. Do you have with you the receipts for the pay received by all jurors from May 24 through June 15?

A. I do.

Q. Do you have with you the attendance records of all jurors between those days?

A. Yes, sir.

Q. Do you have with you the original pay records signed by the Clerk of Court?

A. I do.

MR. MARGIOTTI: The original what? May I have that question read?

JUDGE MURPHY: Just a minute please. Mr. Reporter, will you read the question back, please?

(794) (Question read.)

JUDGE MURPHY: Just a minute, please. It hasn't been answered. Oh, it has. What is the answer?

(Answer read.)

JUDGE MURPHY: Proceed.

BY MR. VAN ARTSDALEN:

Q. Mr. Leedom, referring to your records, will you tell us, please, what receipt, if any, you have for W. D. Pardoe?

MR. MARGIOTTI: I object to the witness reading the contents of the document, as the document is the best evidence.

JUDGE MURPHY: He asked what receipt he has, and I assume he is going to produce a paper, if any.

MR. MARGIOTTI: If he does that—I have no objection. Maybe I am anticipating.

THE WITNESS: I have a receipt here for two days of eight dollars.

MR. MARGIOTTI: Now, if Your Honor please, I object to the contents of these papers.

JUDGE MURPHY: Are you going to lay the groundwork and offer them in evidence or not, sir?

MR. VAN ARTSDALEN: Yes. We at this time offer them in evidence.

JUDGE MURPHY: Are you going to show it is kept in the regular course of business in compliance with the statute (795) and whether it is the regular course of business to keep it, and did he take it from the place where it was kept and bring it here? Then offer it.

BY MR. VAN ARTSDALEN:

Q. Mr. Leedom, are you the custodian of the records that you have there?

A. I am.

Q. Are they official records of the County of Bucks?

A. They are.

Q. Where are they kept?

A. In the Controller's office.

Q. May I have it? (Witness hands papers to counsel.) Mark this exhibit, please. (Addressing the Clerk.)

JUDGE MURPHY: We will have the relator's exhibits marked R-1, 2, 3, 4 and 5. I beg your pardon... The Commonwealth's—we have already had the relator's—1, 2, 3, 4, and 5. Is it Relator, or what?

MR. RYDER: I tried to make it clear the other day that the state is the respondent. It doesn't make any difference, either Respondent's or the State's.

JUDGE MURPHY: It will be the Respondent's Exhibit No. 1.

(The document above-referred to was marked for identification Respondent's Exhibit No. 1.)

(796) BY MR. ARTESDALEN:

Q. Mr. Leedom, I show you what has been marked as Respondent's Exhibit No. 1, and ask you what that exhibit is?

A. These are the original receipts signed by the jurors for their recompense for the days served.

Q. And over what period of time does that cover?

A. Monday, June 7, 1948 to and including June 14, 1948.

Q. All right, sir. Now, do you have any other records with you. I will withdraw that question until this exhibit is marked, please.

(The document above-referred to was marked for identification Respondent's Exhibit No. 2.)

JUDGE MURPHY: Mr. Leedom, were those records, particularly Exhibit 1, kept in the usual course of business?

THE WITNESS: Yes sir.

JUDGE MURPHY: And was it the usual course of business to keep such records?

THE WITNESS: As these? (Indicating.)

JUDGE MURPHY: Yes.

THE WITNESS: Yes, sir.

BY MR. ARTSDALEN:

Q. Mr. Leedom, I show you Respondent's Exhibit No. 2 and ask you what that contains, please?

A. That is the record of the jurors paid for the weeks (797) starting May 24, 1948 to and including Friday, June 4, 1948. Also the attendance record is attached of the days that the jurors served.

Q. And referring again, please, to Respondent's Exhibit No. 1, is there also an attendance record there?

A. That is correct.

Q. And what period of time does that attendance record cover?

A. June 7, 1948 to and including June 14, 1948.

Q. Do you have any other records here with you?

A. I have the original authorization for the payment of the jurors from the Clerk of Courts.

Q. And are they kept in your office in the usual course of business?

A. That is correct.

Q. Are they part of the official records of the County of Bucks?

A. That is corect.

MR. VAN ARTSDALEN: I think that I have one of those left to be marked individually.

JUDGE MURPHY: It is your choice, sir. We have already marked Respondent's Exhibits Nos. 1 and 2. What is the next situation? If they have some connection with each other they should be marked 3-A, B, C, and so forth.

MR. VAN ARTSDALEN: Let me look at these just a (798) second, please.

BY MR. ARTSDALEN:

Q. Mr. Leedom, just to clear up one point first – you have these warrants in two separate groups?

A. That is right.

Q. What is the reason for their being in two separate groups?

A. One is the Foster, Zeitz murder jury, and the other is the Darcy murder jury.

MR. VAN ARTSDALEN: Please mark these. (Addressing the clerk.)

JUDGE MURPHY: Just to keep the sequence, the Foster, Zeitz will be marked 3 and Darcy marked 4.

MR. ARTSDALEN: While they are being marked, I should like to offer in evidence, Your Honor, Respondent's Exhibit No. 1 and Respondent's Exhibit No. 2.

MR. MARGIOTTI: If Your Honor please, may we ask that the Court defer ruling on the exhibits until we are given an opportunity to cross-examine.

JUDGE MURPHY: We will afford you that opportunity right now.

MR. MARGIOTTI: Thank you, judge.

JUDGE MURPHY: As to this question only.

MR. MARGIOTTI: What is that?

JUDGE MURPHY: As to this question only.

(799) MR. MARGIOTTI: Yes. That is right.

BY MR. MARGIOTTI:

Q. Mr. Leedom, have you brought here all the basic papers in the papers that you have presented?

A. As far as I know.

Q. Didn't the jurors have what is known as a punch card system? Wasn't there a punch card system in your court at that time?

A. If they did it was taken care of in the Clerk's Office, and that original voucher authorizing payment was made from that card by the Clerk of Courts.

Q. In other words, that voucher would be made from a punch card?

A. That would be my understanding. They have a card punched each day, correct?

Q. The juror then had a card and every day that he appeared in court somebody punched that card?

A. That is my understanding, although it does not concern my office.

Q. I understand that, and that card—have you ever seen one of the cards, the jurors' cards?

A. Oh, I believe I have.

Q. What is it like?

A. It is a small card about four and a half to five, maybe (800) not quite that large either. It is a smaller card than that.

Q. And when does a juror get that card?

A. I am afraid I couldn't answer that question.

Q. And who does the punching?

MR. VAN ARTSDALEN: If the Court please, I think he has already ——

JUDGE MURPHY: If he knows. Do you know who does the punching? is the question. Did you ever see it done?

THE WITNESS: Yes, sir.

JUDGE MURPHY: All right. Then you can answer the question.

THE WITNESS: It depends on the type of court. Some are done by the Clerk of Court; others are done by the Prothonotary's Office if it is a civil case.

BY MR. MARGIOTTI:

Q. Do those cards bear dates?

A. I couldn't answer that.

Q. Do they bear the days of the weeks, that is, Monday written on?

A. I have never examined a card that closely.

Q. Where were these holes punched on the card? Was it just a hole punched?

A. I presume that it is a regular attendance record which the Clerk of Courts has and submits to the juror when they start

(801) serving.

Q. When the juror is through with his service, what is done with his card?

A. That is up to the Clerk of Courts.

Q. Do you know whether it is turned in to the Clerk of Courts?

A. I don't know.

Q. Didn't you say a moment ago that the pay warrants are based upon that card?

A. I would presume that was so, either that or the attendance records.

Q. Well, then on these cards, these exhibits that you have before the Court at this time: there are check marks under various days of the week. Do you notice that?

A. Yes, sir.

Q. Where does that information come from?

A. From the Clerk of Courts' office. They keep the record.

Q. They keep that record; you don't keep it?

A. No, sir.

Q. So that this is not a record in your own office?

A. It is kept in our own office along with the exhibits.

Q. In other words, the Clerk of Courts makes it and sends it over to you?

A. It is supposed to substantiate those payments.

Q. Then upon what the Clerk of Courts' office sends over to (802) you, you make the payments?

A. That is correct.

Q. Do you remember being subpoenaed by the Relator—at least in behalf of the Relator in this case?

A. Yes, sir.

Q. And you came here?

A. Yes, sir.

Q. Do you remember being asked to obtain the original cards, the basic information, the punch cards; do you remember that?

A. No. I do not.

Q. Well, at any rate, you did not bring them?

A. That is correct. They are not kept in my office.

Q. And you did not have them?

A. No, sir.

Q. What you got from the Clerk's Office is this traverse jury list, this long list here?

A. Along with the original

Q. Original what?

A. Authorization to pay those jurors.

MR. MARGIOTTI: Will you give me the top paper?

(Addressing the Clerk.)

BY MR. MARGIOTTI:

Q. And by that you mean Respondent's Exhibit No. 4, which is your authorization?

(803) JUDGE MURPHY: Read the question, Mr. Reporter. (Question read.)

BY MR. MARGIOTTI:

Q. Just answer the question.

A. Yes.

Q. Now, then, you have here pay vouchers, a copy of them, I assume, or are they originals?

A. They are the originals, signed by the principal themselves upon the receipt of their payments.

JUDGE MURPHY: Let the record show that the Clerk handed to Mr. Margiotti a group of papers, the first one of which is marked Respondent's Exhibit 4-A. The other group of papers, beginning with Respondent's Exhibit No. 3-A, is in the Clerk's desk.

(Group of documents was marked for identification Respondent's Exhibits 3-A to Z, Z-1, Z-2, Z-3, inclusive.)

(Group of documents was marked for identification Respondent's Exhibits 4-A to Z, Z-1, Z-2, Z-3, inclusive.)

BY MR. MARGIOTTI:

Q. Now, these vouchers for pay do not show the particular days that a juror was in attendance, do they?

A. No. That is correct.

Q. And the authorizations which the Court has just referred to, and I think they are marked Respondent's 4-A and Respondent's (804) 3-A—merely give the number of days but do not show what days?

A. That is correct.

Q. Now, the only place where you do have the days is a paper that comes from some other office?

A. That is right.

Q. And which you keep in the course of your business, and that is this long paper attached to Respondent's Exhibit No. 1, and being headed "Traverse Jury List"?

A. That is right.

Q. This paper is not made up in your office?

A. No, sir.

Q. It is this paper that you say is made up from these cards, that are punched?

A. Not being in that office, I can't definitely say that.

Q. I see. You do not know?

A. I have no way of knowing. That is correct.

Q. You do not know where this information comes from?

A. From the Clerk of Courts.

Q. You do not know how the Clerk of Courts keeps this or where he gets the information, do you?

A. From the daily accounts.

JUDGE MURPHY: Do you know of your own knowledge" is the question. Do you work in the Clerk's of Courts Office?

THE WITNESS: No sir.

(805) JUDGE MURPHY: Do you know where they get the

information when they do it? Do you know of your own knowledge? is the question.

THE WITNESS: Having served on the jury myself, it has been necessary to turn your card in the day that you served on the jury in the Clerk of Courts.

BY MR. MARGIOTTI:

Q. Your punch card showed the number of days you attended?

A. And they took the card the day you attended.

Q. And each hole showed the day you attended, is that right?

A. That is right.

Q. You know nothing about how this long sheet is kept by the Clerk, do you?

A. No.

MR. MARGIOTTI: At this time we object to the offer for the reason that they are not properly proved.

JUDGE MURPHY: The objection is overruled, and they will be received in evidence as records of the office in which they are kept after they come to the point of payment and payment is made. They will be received.

(Respondent's Exhibits Nos. 1 and 2, respectively, heretofore marked for identification, were received in evidence.)

JUDGE MURPHY: We will recess until 2 o'clock at which time the witness will be on direct examination.

806 (Luncheon-Recess.)

AFTERNOON SESSION

(The Relator, David Darcy, present in court.)

JUDGE MURPHY: So that the record will be clear, the ruling of the Court immediately before the noon recess was as to the offer of Respondent's Exhibits Nos. 1 and 2, that the objections were overruled, and Respondent's Exhibits Nos. 1 and 2 are received in evidence.

MR. VAN ARTSDALEN: Thank you, sir.

MR. MARGIOTTI: Your Honor, has No. 3 and 4 been offered?

JUDGE MURPHY: They have not been offered according to our recollection, but the record is the best evidence.

ERNEST M. LEEDOM, resumed the stand, and testified further as follows:

DIRECT EXAMINATION (Continued).

BY MR. VAN ARTSDALEN:

Q. Mr. Leedom, I show you what has been marked as Respondent's Exhibit No. 3 and ask you what those papers are, please?

A. They are the original order from the Quarter Sessions to pay the jurors for their services. There are two authorizations (807) for each juror due to the fact that they serve six days in different weeks.

Q. Now, the Exhibit No. 3 that you have there in your hand, Mr. Leedom, for what jury was that?

A. It was the Foster, Zietz jury.

JUDGE MURPHY: Mr. Reporter, will you read that question and answer?

(Record read.)

BY MR. VAN ARTSDALEN:

Q. There are how many separate sheets of paper, sir?

A. (Counting.) 28.

JUDGE MURPHY: How many?

(Answer read.)

BY MR. VAN ARTSDALEN:

Q. Will you kindly keep your voice up, Mr. Leedom? I now show you Respondent's Exhibit No. 4 and ask you what that is, please?

A. They are the authorizations from the Quarter Sessions to pay the jurors in the Darcy case. There are also two receipts for each juror—two authorizations, rather.

Q. And how many do you have there in Exhibit 4 altogether, sir?

A. 28.

Q. Where have these exhibits been kept prior to their coming here?

A. In the Controller's Office.

(808) Q. Are they part of the regular business records of the Controller's Office?

A. Yes, they are.

Q. Do they comprise part of the official records of that office?

A. That is correct.

Q. Are you the custodian of those records?

A. Yes, sir.

MR. VAN ARTSDALEN: If the Court please, I wish to offer in evidence Respondent's Exhibit No. 3, including No. 3-A through 3-Z, and Z-1, 2 and 3.

MR. MARGIOTTI: If Your Honor please, for the record I wish to enter an objection for the reason that they are not complete, and they are based upon punch cards of the jurors which are not in evidence and have not been offered in evidence, and there is no statement from the District Attorney that they will be offered in evidence.

JUDGE MURPHY: The objection is overruled. Exhibit No. 3 as identified will be received in evidence.

(Documents heretofore marked for identification Respondent's Exhibits Nos. 3-A to Z, and Z-1, 2 and 3, inclusive, were received in evidence.)

MR. VAN ARTSDALEN: If the Court please, I wish to offer in evidence Respondent's Exhibit No. 4, being a series (809) of papers, Respondent's Exhibits 4-A through 4-Z-1, 4-Z-2, and 4-Z-3.

MR. MARGIOTTI: If Your Honor please, may I have the same objection noted as to No. 3?

JUDGE MURPHY: The objection is overruled. They will be received in evidence as identified in the offer.

(Documents heretofore marked for identification Respondent's Exhibits Nos. 4-A to 4-Z, and Z-1, Z-2, and Z-3, were received in evidence.)

BY MR. VAN ARTSDALEN:

Q. Now, Mr. Leedom, referring to Respondent's Exhibit No. 1, will you tell us, please, what those records show as to the attendance of W. D. Pardoe?

A. You mean the number of days or the receipt?

Q. Referring to the receipt.

A. According to the first receipt he was paid—Mr. Pardoe was paid for five days, June 7, 8, 9, 10, 11 and 12. On the second receipt he was paid for two days, June 13 and 14.

Q. All right, sir. I want to ask you what the receipts indicate as to Anna W. Bucher—the receipts and the records?

A. The receipts show Anna Bucher was paid for June 7, 8, 9, 10, 11, 12 on one receipt, and on the other receipt she was paid for June 13 and 14.

Q. I refer now to Marvin D. Weidner.

(810) A. Weidner was paid on one receipt for June 7, 8, 9, 10, 11 and 12 of 1948, and for two days, June 13 and 14 of 1948.

Q. Jesse H. Horne.

A. Jesse H. Horne was paid for six days, June 7, 8, 9, 10, 11 and 12, on one receipt, and on the other he was paid for June 13 and 14, 1948 on another receipt.

Q. Oliver C. Landis.

A. Oliver C. Landis was paid on a receipt for June 7, 8, 9, 10, 11 and 12 of 1948, and June 13 and 14 1948 on another receipt.

Q. Franklin T. Fretz.

A. Franklin T. Fretz was paid for June 7, 8, 9, 10, 11 and 12, 1948 on one receipt, and on another receipt, June 13 and 14, 1948.

Q. Roger Mason.

A. Roger Mason was paid for June 7, 8, 9, 10, 11, and 12, 1948 on one receipt, and for June 13 and 14, 1948 on another receipt.

Q. Ruth G. Bliss.

A. Ruth G. Bliss was paid for June 7, 8, 9, 10, 11, 12, 1948, and on another receipt for June 13 and 14, 1948.

Q. Ann L. Reed?

A. Ann L. Reed was paid for June 7, 8, 9, 10, 11, 12, 1948 on one receipt and June 13 and 14, 1948 on another receipt.

(811) Q. William F. Hickey.

A. William F. Hickey was paid for June 7, 8, 9, 10, 11, 12, 1948 on one receipt and for June 13 and 14, 1948 on another receipt.

Q. Virginia Brillman.

A. Virginia Brillman was paid for June 7, 8, 9, 10, 11, 12, 1948 on one receipt and for June 13 and 14, 1948 on another receipt.

Q. Mr. Leedom, have you examined the records between May 24 and June 15 to ascertain whether any of those persons whose names I have just called, were paid for any other days during that period of time?

MR. MARGIOTTI: What date?

BY MR. VAN ARTSDALEN:

Q. Between May 24 and June 15 other than the dates you have just referred to?

A. What was that? Give me the date again, please?

Q. Between the date of May 24 and June 15. I will withdraw the question and rephrase it.

Mr. Leedom, have you examined all of the receipts between May 24 and June 15?

A. I have.

Q. And have you ascertained whether or not any of these fourteen persons whose names I have just called off and you referred (812) to, were paid between May 24 and June 15 for any times or any amounts of days other than those you have just testified to?

A. They have not been.

Q. And did you make an examination of the records for that purpose?

A. I did.

Q. Mr. Leedom, referring again to Respondent's Exhibit No. 4, there is a name that appears on those, is that correct—the signature on those exhibits?

A. That is correct, yes, sir.

Q. Will you just examine them quickly and tell me whose signatures appear on those?

A. Matthew L. Godshall, Clerk of Quarter Sessions.

Q. Have you examined them all and are you acquainted with his signature?

A. Yes, sir.

Q. Do they also contain the seal of the Court of Quarter Sessions?

A. That is correct.

Q. All right. Now, I want to refer to Respondent's Exhibit No. 3, and ask you what names or signatures if any appear there?

A. Matthew L. Godshall, Clerk of Quarter Sessions and Walter C. Schroeder, Deputy Clerk of Quarter Sessions.

(813) Q. Are you familiar with both of their handwriting?

A. Yes, sir.

Q. And are they their signatures?

A. Yes, sir.

Q. And do they contain the seal of the Court of Quarter Sessions?

A. Yes, sir.

Q. Now, referring to Respondent's Exhibits No. 1, I refer you, sir, to the attendance sheet attached thereto, and ask you whether there is any signature at the bottom thereof?

A. Signed by Matthew L. Godshall, Clerk.

Q. Are you familiar with his signature?

A. Yes, sir.

Q. Is that his signature?

A. It is.

Q. Does the seal of the Court of Quarter Sessions appear thereon?

A. It does.

Q. I refer you, sir, also in Respondent's Exhibit No. 1 to another attendance sheet, and ask you whether there is a signature attached to the bottom of that?

A. Signed by Walter C. Schroeder, Deputy Clerk.

Q. Is that the signature of Walter C. Schroeder?

A. It is.

(814) Q. And is the seal of the Court of Quarter Sessions attached thereto?

A. It is.

Q. I refer you, sir, to Respondent's Exhibit No. 2, and refer you to the bottom of the attendance sheet or the first attendance sheet attached to that exhibit, and ask you whose signature if any appears on the bottom?

A. Signed by Matthew L. Godshall, Clerk.

Q. And is that his signature?

A. It is.

Q. Is the seal of the Court of Quarter Sessions attached thereto?

A. Yes.

Q. I show you the second sheet of Respondent's Exhibit No. 2, the second attendance sheet, and ask you whose signature is affixed to the bottom thereof?

A. Walter C. Schroeder, Deputy Clerk.

Q. That is his signature, sir?

A. It is.

Q. And is the seal of the Court of Quarter Sessions attached thereto?

A. It is.

MR. VAN ARTSDALEN: Cross-examine.

(815) CROSS-EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Leedom, you said that you examined the records in order to ascertain whether there had been any payments made between May 24 and, I believe, the date of June——

MR. VAN ARTSDALEN: The 15th.

BY MR. MARGIOTTI:

Q. 15. Do you remember that question and answer?

A. Not that direct question.

Q. Well, do you remember that you said that you did examine the records in order to ascertain whether there had been any payments made between May 24, 1948 and June 15?

A. Other than the murder jury.

Q. What is that?

A. The question was other than the murder jury.

Q. I didn't know that was inserted in the question.

JUDGE WATSON: Other than those names mentioned, that was the question. That is my recollection, but you can have it read if you like.

MR. MARGIOTTI: I am not trying to be dishonest with the Court or the witness.

JUDGE WATSON: I know you are not. I won't interrupt you. I thought I was going to save a little time.

MR. MARGIOTTI: I do not mind interruptions, Your Honor.

(816) BY MR. MARGIOTTI:

Q. You said you examined what records between May 24 and June 15—other than the murder jury I think you said?

A. That is correct.

Q. Now what records did you examine?

A. All of the records.

Q. What records? Identify them.

A. The jurors who served between May 24 and also up to June 14.

Q. And also what?

A. Up to and including the 14th of June, 1948.

Q. From May 24 to June 14, inclusive?

A. Yes, sir.

Q. Are those records here? Are the records that you examined all in evidence?

A. They are right here. Yes, they are offered in evidence.

Q. So that any records you examined are already in evidence here, it wasn't that you examined some other records that we don't have here in court?

A. No.

Q. All right, and you also were asked if you examined all receipts as to whether there were payments between May 24 and June 15, do you remember that?

A. Yes, sir.

(817) Q. Now, what receipts did you examine?

A. I examined all the receipts which I have here.

Q. Which you have here?

A. Yes, sir.

Q. But nothing outside of what is in court and is in evidence?

A. Well, these receipts covering these periods.

Q. I understand that but everything is here?

A. As far as I know.

Q. All right. That is what I wanted to get at. Now, on the date of June 1, 1948 you would expect to find any records concerning that date in Respondent's Exhibit No. 2, which is the one that starts with May 24th, is that right? Wouldn't you? Do you understand the question, Mr. Leedom?

A. Not exactly.

Q. Wherein in these two exhibits, Exhibit No. 1 and Exhibit No. 2 of the Respondent, would you find the date of June 1?

A. It is on there under June 1 of the jurors that served June 1.

Q. Would you like to look at them? I will bring them up there.

A. Yes.

Q. All right. (Handing.)

A. June 1, 2, 3, and 4.

JUDGE MURPHY: For the record, it is the Court's understanding that Respondent's Exhibit No. 1 covers the dates (818) from June 8 to June 14, and no other dates.

THE WITNESS: It is No. 2.

JUDGE MURPHY: And Respondent's Exhibit No. 2 covers from 5-24-48 to 6-4-48, and no other dates.

MR. MARGIOTTI: That is correct.

BY MR. MARGIOTTI:

Q. Now, if the jurors came in on a specific day, to wit June 1, 1948 and were sent home that day, where would there be any record made of that?

A. The record would be made that the County would be liable for the pay, or the court is liable for the pay for that day if they appeared.

Q. Well, would there be any record made for it?

A. Certainly not in the controller's office.

Q. Well, in whose office would it be?

A. The branch of the court's.

Q. What is that?

A. A branch of the court's.

Q. What branch of the court?

A. I presume it would be the Clerk of Quarter Sessions Office.

Q. That would be Mr. Godshall's office?

A. That is right.

Q. And you would not have it in Exhibit No. 1 and No. 2, would you?

(819) JUDGE MURPHY: Read that question, Mr. Reporter.

(Question read.)

JUDGE MURPHY: By "it" you mean what? We understand if they came in and were paid as of June 1, it would be in Exhibit No. 1 and 2. If they were not paid it would not appear in Exhibit No. 2. That is what we understand it, and the witness said he found there was no evidence that anybody was paid for that day.

MR. MARGIOTTI: If Your Honor please, there is evi-

dence here that someone returned on June 1 and some people were excused on that day.

JUDGE MURPHY: It is up to the Court to find the facts. The Court distinctly recalls what the testimony was.

MR. MARGIOTTI: I am pursuing the examination along that line.

THE COURT: You are perfectly free to pursue it as long as you desire.

BY MR. MARGIOTTI:

Q. If they came in and were sent home you said Mr. Godshall would keep a record of that?

A. That is not for me to say.

Q. Didn't you say that?

A. If Mr. Godshall kept a record of it we would have been authorized to pay the juror for coming in that day.

(820) Q. If he kept a record of it and turned it over to you?

A. I suppose he turned it over to us for payment if they served that day.

JUDGE MURPHY: What we have in the record so far is proof, so far as this witness is concerned, of the usual course of business, that if they did turn up or show up they should be paid. If they were paid they could only be paid by the Clerk of Quarter Sessions certifying it on a certificate paper, and they would be paid by the Controller, and if they were paid they should have a receipt, and he finds no receipts and no attendance records of any kind to show any appearance on June 1.

MR. MARGIOTTI: But, if Your Honor please, the rec-

ords show, according to my contention - I may be wrong - that they were there June 1. They could have been excused. They could have been turned in for payment. They may have neglected to do so and they weren't paid.

JUDGE MURPHY: I believe we could indulge in a number of assumptions, and we will find the facts on the record before us.

BY MR. MARGIOTTI:

Q. Where is Mr. Godshall now?

A. Mr. Godshall lives in Doylestown. He is out of office at the present time.

JUDGE MURPHY: May we inquire, was not Mr. Godshall (821) excused by you?

MR. MARGIOTTI: We had him here as a witness, and he testified and he went home, but there is no reason that the Commonwealth cannot call him if they want him. I have'nt a monopoly on witnesses.

JUDGE MURPHY: No.

BY MR. MARGIOTTI:

Q. When you were subpoenaed by the Relator in this case and you appeared here in court, did Judge Pannell interrogate you, this gentleman to my left?

A. No, sir.

Q. Did you talk to him?

A. Yes, sir.

Q. That is what I meant by interrogating, and did you discuss—did you have some papers with you?

A. I did.

Q. Did you have these papers with you that you have now?

A. Yes, sir.

Q. All of them?

A. All except those authorizations from the court or the Clerk of the Court for payments. I have the payroll records and the receipts I had here.

Q. Did you have that long sheet, Mr. Leedom?

A. These complete, both of them.

(822) JUDGE MURPHY: By "this complete," the witness is holding in his hand Respondent's Exhibit No. ——

THE WITNESS: No. 1 and No. 2, I think.

JUDGE MURPHY: And No. 2?

THE WITNESS: Yes, sir.

BY MR. MARGIOTTI:

Q. That is the long sheet attached to both of them.

Do you yourself have any independent recollection of seeing any jurors that appeared on June 7 about the court house prior thereto?

MR. VAN ARTSDALEN: I object to that.

JUDGE MURPHY: Sustained as it stands. That covers almost fifty years, I take it.

MR. MARGIOTTI: Well, within the week before. I will limit it to a week.

MR. VAN ARTSDALEN: I still object, Your Honor. I do not think it is proper cross-examination.

JUDGE MURPHY: We will permit it. As I understand it, you are now asked if you saw any jurors who appeared on the venire for the week of the Darcy trial and who actually appeared on the day of June 7—had you seen them in or about the court house prior thereto for a period of—how long?

MR. MARGIOTTI: One week.

JUDGE MURPHY: Of one week?

(823) THE WITNESS: No. I did not.

JUDGE MURPHY: All right.

BY MR. MARGIOTTI:

Q. Do you know any of those jurors personally?
A. No. I do not, not a one of them.

MR. MARGIOTTI: That is all.

MR. VAN ARTSDALEN: If Your Honor please, there was one question I neglected to ask this witness.

RE-DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Leedom, do you know Raymond Allen?
A. Former Sheriff of Bucks County, yes, sir.

JUDGE MURPHY: You did not neglect to ask him. You did ask well, go ahead. We will save time.

BY MR. VAN ARTSDALEN:

Q. Do you know where he is at the present time, sir?
A. I understand that he is in a mental hospital.

MR. VAN ARTSDALEN: We understood that the Deputy was in a mental hospital. Is the Sheriff there too?

THE WITNESS: No. The Deputy is at home. The Sheriff is in a mental hospital, the ex-sheriff.

MR. MARGIOTTI: Then Mr. Knox is back?

THE WITNESS: He has always been at home.

(823-A) MR. MARGIOTTI: And he is still at home?

THE WITNESS: He is at home indisposed with a series of strokes he had a year ago.

MR. MARGIOTTI: I see.

JUDGE MURPHY: That means we have five dead and two others practically disposed of so far after this trial.

MR. VAN ARTSDALEN: That is all, sir.

(Witness excused.)

(824) MR. VAN ARTSDALEN: If the Court please, pursuant to Section 2245 of the Revised Judicial Code we wish to

offer into evidence the certificate of Honorable Hiram H. Keller, trial Judge of this case.

JUDGE MURPHY: May I see it, please?

MR. VAN ARTSDALEN: Yes, sir. (Handing).

JUDGE MURPHY: That would be Relator's Exhibit Number ——

MR. VAN ARTSDALEN: Respondent's Exhibit No. 5.

JUDGE MURPHY: Respondent's Exhibit No. 5.

(Document above-referred to was marked for identification Respondent's Exhibit No. 5.)

MR. VAN ARTSDALEN: I might add that that certificate was handed to me personally by Judge Keller.

JUDGE MURPHY: We will take a ten minute recess.

(Recess taken.)

(David Darey present in court.)

MR. VAN ARTSDALEN: If the Court please, we have a copy for the Court if they would care to have it. (Handing)

MR. MARGIOTTI: If you have a copy for us it will save a little time.

JUDGE MURPHY: Do you have a copy for the Relator's counsel?

MR. VAN ARTSDALEN: We have one copy that we have for them.

(825) JUDGE MURPHY: Will you hand it to him?

MR. VAN ARTSDALEN: Yes, sir. (Handing)

JUDGE MURPHY: May the record note that in the presence of the Court Relator's counsel has been handed a copy.

(Recess taken.)

(David Darcy present in court.)

JUDGE MURPHY: As we understand it, there has been an offer of a paper which has been marked Respondent's Exhibit No. 5, and the Court makes this inquiry: Does the counsel for the Relator have any objection?

MR. MARGIOTTI: We do, Your Honor. We object to the certificate as such for the following reasons: In the first place, it is not a certificate in compliance with the act itself. Second, there is nothing before this Court to show that the certificate has been made in compliance with the act. Next, the certificate itself undertakes to discuss matters under oath relative to the ability of—for instance, under Paragraph No. 9, the certificate itself goes much further than is required by the act under which it is offered. In fact, it is not a certificate, but an affidavit of His Honor, Judge Keller.

Judge Keller presumably is in court and has been in court all day, and has been here since 10 o'clock this morning. I do not know. I have not been informed, therefore do not wish to state whether he is under subpoena or has appeard voluntarily. (826) I only know he has been here, and the affidavit goes far beyond the provisions of the act. I think I have covered that.

Discussion

JUDGE MURPHY: Are you through, sir?

MR. MARGIOTTI: Just a minute, Your Honor. May I see the original, Your Honor? (Examining document) Furthermore, there is nothing on the certificate itself to show that copies of the certificate have been filed with the court in which the application—yes, in the court in which the trial took place.

JUDGE MURPHY: Are you through?

MR MARGIOTTI: Yes, sir.

JUDGE MURPHY: It appears to this Court that the certificate in question has been offered in good faith, that it is the certificate of the trial Judge, and as we examine it, it is precisely on the questions that are in controversy before this Court. The objections are overruled. It will be received in evidence.

(Document heretofore marked for identification Respondent's Exhibit No. 5, was received in evidence.)

MR. VAN ARTSDALEN: May this be marked?

(Document above-referred to was marked for identification Respondent's Exhibit No. 6.)

MR. MARGIOTTI: Will the Court permit the record to show that the rulings were made at 3 o'clock, and the Judge has been here since 10 o'clock?

(827) JUDGE MURPHY: It was made a minute and a half to 3 exactly.

MR. MARGIOTTI: And that he is still here?

JUDGE MURPHY: I do not know who is still here.

MR. MARGIOTTI: The Judge.

JUDGE MURPHY: I have never seen Judge Keller in my life. I do not know whether he is in the courtroom or not.

MR. MARGIOTTI: I guess we can agree that he is this fine gentleman. (Indicating.)

(Man arises in courtroom.)

JUDGE MURPHY: We are delighted to have you here, now that this gentleman is called to the Court's attention. We are delighted to have you here because you are a judge, and are delighted to have everybody here seeking justice.

MR. VAN ARTSDALEN: If the Court please, I desire to offer in evidence Relator's Exhibit No. 6, which is a certificate of Edward G. Biester, who is presently a judge of the Court of Common Pleas, Bucks County. We are offering this now under Section 2246 of the Revised Judicial Code. I might also add that this was given to me by Judge Biester, that Judge Biester is also in court, and has stated his willingness, if the Court sees fit, to testify. However, we did not feel it was proper for the Commonwealth to call a member of the judicial staff of the state of Pennsylvania, and I might also add, Your Honor, if (828) I may, that both Judge Keller and Judge Biester are here voluntarily, not under subpoena by the Commonwealth or by anyone else, but have appeared voluntarily.

JUDGE MURPHY: Now, first of all, do you have a copy for Relator's counsel?

MR. VAN ARTSDALEN: Unfortunately I do not.

JUDGE MURPHY: Then we will have Relator's counsel examine it before the Court will.

(Mr. Margiotti examined document.)

JUDGE MURPHY: Do you now have a copy?

MR. VAN ARTSDALEN: I do, Your Honor. (Handing.)

JUDGE MURPHY: Let the record note that Relator's counsel has received a copy in open court.

As we understand the act in question, Section 2246 reads as follows:

"On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

We have now the offer on the part of the Respondent of Respondent's Exhibit No. 6, which purports to be an affidavit by one Edward G. Biester, who at the time of the trial in question was the District Attorney of Bucks County, Pennsylvania; and (829) who thereafter was made a Judge of the Court of Common Pleas of Bucks County. The paper in question is offered then as the affidavit of one who was District Attorney and who now is a sitting Judge in Bucks County, Pennsylvania. Is there objection to the offer?

MR. MARGIOTTI: We object to the offer in evidence, Your Honor, for the reasons that Judge Biester has been in court since 10 o'clock this morning. It is now 3 o'clock in the afternoon, and he is available as a witness. As I understand it from the District Attorney he has appeared voluntarily and not under subpoena, and we feel that the affidavit should not

be received although it is within the discretion of the Court under this Act, and we feel that the Judge ought to take the stand.

JUDGE MURPHY: We will cross that bridge when we come to it. The Court's ruling is that the present objection is overruled and the exhibit is received in evidence.

MR. MARGIOTTI: I did not hear Your Honor.

JUDGE MURPHY: The objection is overruled and the affidavit is received in evidence.

(Document heretofore marked for identification Respondent's Exhibit No. 6 was received in evidence.)

MR. MARGIOTTI: At this time, Your Honor, we ask leave to propound written interrogatories to the affiant?

JUDGE MURPHY: That motion is taken under advisement. (830) The gentleman is in court as you have already stated on the record, and it is not your side of the case. We will take the motion under advisement. The Respondent is now putting its case in.

MR. MARGIOTTI: Your Honor, I cannot very well have interrogatories prepared when I did not even know the motion is going to be made.

JUDGE MURPHY: If you want to challenge his affidavit you can call him.

MR. MARGIOTTI: As a witness?

JUDGE MURPHY: Yes, sir, when it comes to your side of the case. We are on the Respondent's side now.

MR. VAN ARTSDALEN: Mr. Edward Wunsch.

JUDGE MURPHY: I might say to defense counsel or the Relator's counsel that we have taken, as we stated, your request for interrogatories and we are reserving ruling on that for the moment.

MR. MARGIOTTI: Judge, I do not have it ready.

JUDGE MURPHY: Of course you do not. We reserve ruling on it, and if we rule against you you will not have much of a problem for the present, but if we rule in favor of you you have work to do. All right.

(831-2) EDWARD F. WUNSCH, called as a witness in behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Wunsch, where do you live?
A. Lower Southampton Township.
Q. Can you give us an address?
A. Feasterville.
Q. How old are you?
A. 31.
Q. What is your present occupation?

A. Chief of Police, Lower Southampton Township.

Q. What was your occupation on December 1, 1947?

A. Assistant foreman of the Budd Company, working for Edmund G. Budd Company.

Q. What was your occupation on June 15, 1948?

A. I was employed in the same—by the same company.

Q. Did you have the same employment in between December 1, 1947 and June 15, 1948?

A. Yes, sir.

Q. Now, in order to further identify yourself, sir, are you the Edward Wunsch that testified in the Foster-Zietz case and in the Darcy case?

(833) A. Yes, sir.

JUDGE MURPHY: Excuse me just a minute. The ruling of the Court is that the Relator's counsel will be afforded a reasonable time to give some idea of the length of time they require to submit, in connection with the affidavit just received, interrogatories to Judge Biester.

BY MR. VAN ARTSDALEN:

Q. And to further identify ——

JUDGE MURPHY: I am sorry to interrupt you. I wanted to get that ruling made. As we understand it, Relator's counsel will give the matter some thought, and before the afternoon is over if possible advise the Court how much time they will require to get their interrogatories ready, and if the request is thought reasonable, and we expect it will be, we will grant that time.

Now, will you read the question asked the witness?

(Question read.)

BY MR. VAN ARTSDALEN:

Q. Now, Mr. Wunsch, to further identify yourself were you one of the persons that was in the Feasterville Tavern on the night of the shooting?

A. Yes, sir.

Q. Now, Mr. Wunsch, do you remember the date of the shooting?

A. It was December 22.

(834) Q. Now, between December 22, 1947 up until the date of the trial, where were you living?

A. In Feasterville on Buck Road.

Q. Were you at that time married or single, sir?

A. I was married.

Q. During that period of time were you in Feasterville between December 1, 1947 and the time of the Darcy trial?

A. Yes, sir.

Q. May I ask you whether during part of that time you were in the hospital?

A. Yes, sir; I was.

Q. During what period of time, sir?

A. The dates I gave, as closely as I can remember—I mean, there may be—I went into the hospital December 22, the night of December 22, and I was allowed to come home for the Christmas Holidays; and then I returned to the hospital for further hospital treatment and operations.

Q. For how long a period of time?

A. I believe the hospital period was a term of three weeks.

Q. All right, sir. Now, then, between the time of the shooting up until the time of the Darcy trial did you see or observe any mass meetings concerning this case in Feasterville?

A. No, I didn't.

Q. Did you observe any groups of persons talking about this (835) case?

A. No, sir.

Q. What if anything can you tell us of the effect that this incident had at Feasterville?

MR. MARGIOTTI: That is objected to as called for a conclusion.

JUDGE MURPHY: That is exactly the objection you made before and we sustained it. We are consistent. Objection sustained.

BY MR. VAN ARTSDALEN:

Q. Mr. Wunsch, were there any public meetings called as a result of this case that you know of?

A. No, sir. There were no meetings called.

Q. Were there any disturbances created after June 22 relative to this case, if you know?

JUDGE MURPHY: Just a minute, please. Read the question, Mr. Reporter. We are seven months off.

MR. VAN ARTSDALEN: I withdraw the question.

Q. Were there any disturbances relative to this case after December 22, 1947?

A. No, sir.

Q. Now, Mr. Wunsch, did you testify at the Darcy trial?

A. Yes, I did.

Q. Were you present in court on any days during the Darcy trial?

(836) A. Yes, I was.

Q. Will you tell us, please, what days, if you recall?

A. To be perfectly honest I can't recall the entire number of

days that I was present, but I know, I am pretty certain it was June 8 of 1948. I may be wrong but I think that is right.

Q. I believe that the record indicates, Mr. Wunsch, that you testified on Thursday, June 10, 1948.

MR. MARGIOTTI: Objected to as leading.

JUDGE MURPHY: We will take it. We will permit these leading questions as far as the date at which he testified, seven years after.

MR. MARGIOTTI: It is not so serious.

JUDGE MURPHY: Read the question or the statement of counsel.

(Question read.)

BY MR. VAN ARTSDALEN:

Q. Does that refresh your recollection in any way?

A. Yes, sir. I would say I did.

Q. How many sessions of the Darcy trial did you attend?

A. To the best of my knowledge, three.

Q. Were they all morning sessions or morning and afternoon? What sessions were they to the best of your recollection?

A. Why, I attended—they were day sessions mainly. I may have—there was one session at night that I did attend, but I (837) don't recall just what the situation was at that time.

Q. Of the sessions of the Darcy trial that you attended, what, if anything can you tell us about the number of persons that were in the courtroom?

A. I wouldn't say that the courtroom was crowded. I mean there weren't a great number of people there, if that is what you mean.

Q. Where did you go or remain while you were in the courtroom?

A. I sat behind the jury on the top row, and also was out in the vestibule, the vestibule of the right outside of the courtroom.

Q. During any of the sessions and times that you were in the main courtroom during the Darcy trial did you observe any disturbances in the courtroom?

A. I did not.

Q. Did you observe any loud or boisterous talking in the courtroom?

A. No, sir.

Q. Was the courtroom at any time cleared by order of the Court or order of any court officials?

A. Not to my knowledge.

Q. What about the corridors outside of the main courtroom; what can you tell us as to the number of persons that were in the (838) corridors and halls?

A. When?

Q. In the sessions that you attended. Excuse me.

A. To me it would be routine. There was nothing out of the ordinary.

Q. Now, did you observe anything unusual on the streets of Doylestown during the times that you were in Doylestown during the week of the Darcy trial?

A. No, sir.

Q. Did you observe any disturbances in Doylestown?

A. I did not.

Q. Now, will you tell us briefly what conditions existed at the Foster-Zietz trial that you have personal knowledge of?

A. My personal thought would be that it was just routine. There was nothing out of the ordinary in either case.

Q. Now, during the course of the trial of both Foster and Zietz and of Darcy, where were you living at that time?

A. In Feasterville on Buck Road.

Q. Were there any disturbances in Feasterville during either of those trials?

A. No, sir. Not to my knowledge.

Q. Now, Mr. Wunsch, I think you testified you are now Chief of Police of Lower Southampton Township?

A. Yes, sir.

(839) Q. How long have you been Chief of Police, sir?

A. Going on the third year.

MR. VAN ARTSDALEN: Cross-examine.

MR. MARGIOTTI: No cross-examination.

MR. VAN ARTSDALEN: All right, sir. Thank you very much, Mr. Wunsch.

(Witness excused.)

MR. VAN ARTSDALEN: Mr. Handy.

EARL D. HANDY, called as a witness in behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Handy what is your occupation?

A. Warden of Bucks County Prison.

Q. Where do you live at the present time?

A. In the Warden's House in the Bucks County Prison.

Q. How long have you been Warden of Bucks County Prison?

A. Since 1940.

Q. Were you Warden between December 22, 1947 and June 15, 1948?

A. I was.

Q. Do you recall on what date—strike that question, please. (840) Was David Darcy at any time during that period of time in your custody?

A. He was.

Q. On what date was he placed in your custody?

A. I do not know the exact date on that.

Q. Were you present in Doylestown from December 22, 1947 through June 15, 1948?

A. I was.

Q. Did you see or observe any unusual incidents in relation to this case?

A. I did not.

Q. Mr. Handy, you were Warden during the Darcy trial?

A. I was.

Q. Will you tell us, please, by what means Mr. Darcy was taken back and forth between the court house and the Bucks County Prison?

A. We received word over the phone when he was to be taken to the court. At that time two of the state police came to the prison, and we had him ready to transport him to the court house. I personally went with him or followed him in my car.

Q. Mr. Handy, on any of the occasions that the Relator, David Darcy was taken from the prison to the court house or from the court house back to the prison were there any disturbances of any sort that you saw or observed?

(841) A. There was not.

Q. Were there any mass demonstrations or any demonstrations of any sort exhibited against David Darcy?

A. There was not.

Q. Were there any crowds at any time around the entrance to the Bucks County Prison?

A. There was not.

Q. Did you observe any persons around the entrances to the Bucks County Prison on any occasion that you took Darcy out or brought him into the Prison?

A. There might have been a photographer there at one time, but at no time did he ever get into the Prison. Now, whether he got a picture or not I could not say.

Q. How far is the Bucks County Prison from the court house, please?

A. Approximately three and a half squares.

Q. Is that a straight street that one goes on?

A. It is directly—Pine Street runs in front of the Prison and runs directly to the driveway that runs into the court yard.

Q. Were there ever crowds in the place where Mr. Darcy was brought into the court house?

A. There was not.

Q. And how was he brought into the court house, please?

A. He was brought into the court house usually by two state (842) police, handcuffed. He was taken into the rear door and the handcuffs were taken off of him. He was put into the courtroom then as soon as they were ready to take him in.

Q. And at any time was he taken through any crowds or persons whatsoever?

A. He was not.

Q. At any time during the course of the trial or at any other occasions when the Relator was outside of the Bucks County Prison, did you hear or observe any threats or threatening gestures made toward the Relator?

A. I never heard of any.

Q. Did you ever observe it?

A. I did not.

Q. Were there any such incidents ever reported to you?

A. There was not.

Q. Was the Relator ever taken through the main aisle of the courthouse?

A. I would say absolutely no.

Q. And what about the front hall and front corridor of the courthouse?

A. He was not.

Q. Were you in court during all the sessions of the trial of David Darcy?

A. I was there, I believe, every session from the beginning (843) to the end.

Q. Did you see and observe any disturbances of any sort in the courtroom at any time?

A. There wasn't any.

Q. Was the court cleared at any time?

A. It was not.

Q. Where did you sit, Mr. Handy?

A. I usually sat right where the Sheriff sits, that is, coming from the main corridor towards the court benches. I sat on the third or fourth seat to the right-hand side.

Q. Now, will you kindly refer to Relator's Exhibit No. 135, and indicate on that, please, just where it was that you sat?

A. I usually sat approximately here. (Indicating.)

Q. You are indicating the second chair—the fifth chair from the right of the main corridor on the row of chairs immediately in front of the railing that separate the main floor of the courtroom from the spectators' benches?

A. That is correct.

Q. What if anything did you observe about the benches immediately to your rear?

A. Right in back of the row where I was seated, where we

usually have the prisoners seated, we had that bench blocked off.

Q. Just a moment. I want to clear up one thing that may be ambiguous in your statement. Were you sitting alongside of the (844) prisoners or of the prisoner?

A. Sometimes I might have been sometimes one or two seats away from him.

Q. All right. Will you go ahead and tell us about the benches to the rear?

A. We blocked the bench off in back of what we call the prisoners row. We had a chair in each end because we did not want anybody seated there.

Q. At any time during the course of this trial did you hear any spectators in the —or other persons in the courtroom making any threatening statements to or about the Relator?

A. I never heard anybody.

Q. Did you see or observe any magazines or newspapers in the courtroom at any time?

A. I did not.

Q. Were you in a position to see and observe?

A. I was.

Q. Do you have any recollection of where Mr. Bipster, the District Attorney, or Willard S. Curtin sat during the charge of the Court?

A. Most of the time I would say he sat directly in front of the jury.

Q. I am speaking of the charge now, sir. Do you have any independent recollection of where they were seated at that time?

(845) A. I am sorry. I would not say. I do not just recall whether he was sitting there or someplace else.

Q. What can you tell us about the appearances of Judge Boyer in the courtroom?

A. I believe on most of the mornings when court was called

in session he did appear in court on—until the miscellaneous matters were handled, and to the best of my knowledge he then departed for some other cases that he was hearing, that is, for the first few days.

Q. Mr. Handy, referring to Relator's Exhibit No. 135, can you tell us of any changes in the courtroom between the time that this—strike that question out, please.

Referring to Relator's Exhibit No. 135, does that accurately depict the conditions presently existing in the Bucks County Court House courtroom No. 1?

A. That is the present condition now, yes.

Q. What changes if any do you know of that existed at the time of the Darcy trial?

A. To the best of my knowledge there was only two chairs for the judges to sit on.

Q. All right.

A. And then to my own personal knowledge the witness stand was changed where the entrance was made from a different position. Now, I think that is the only difference I see.

(846) Q. There are indicated in that drawing certain tables. Were there any changes in the location of the tables to your knowledge?

A. In the last twenty years that is the way I can recall them.

Q. I want to refer you, Mr. Handy, to Relator's Exhibits 118, 119, 120, and 121, and ask you whether they accurately depict the conditions presently existing in the Bucks County Court House Court Room No. 1? (Handing.)

A. Yes. It does.

Q. Now, then referring to those exhibits are there any changes that existed at the time of the Darcy trial?

A. Yes. I think the entrance to the witness stand here was isn't the same as it is here.

Q. What about tables that are shown in those photographs, sir?

A. The tables look in identically the same position as they were before. I do not see any difference.

Q. Were there any more tables than are depicted in these photographs?

A. You mean over and above of what is here shown in the pictures?

Q. Yes, sir.

A. I never seen anything else.

Q. Were there any fewer tables than shown in these pictures?

A. There were three tables there to my own knowledge.

(847) Q. Do you have any independent recollection of any evening session of court?

A. Are you speaking of the Darcy trial?

Q. The Darcy trial, yes, sir.

A. I believe there was one evening session.

Q. Do you recall whether or not Judge Boyer was in the courtroom during any portions of that session?

A. I wouldn't swear that he was or wasn't. I really do not know.

MR. VAN ARTSDALEN: Cross-examine.

MR. MARGIOTTI: No cross-examination.

(Witness excused.)

MR. VAN ARTSDALEN: Will the Court bear with us just a moment?

(A short interruption.)

MR. VAN ARTSDALEN: The Commonwealth rests, Your Honor.

JUDGE MURPHY: We will take a ten-minute recess.

(Recess taken.)

(David Darcy present in courtroom.)

MR. MARGIOTTI: Mr. Reed.

RAYMOND C. REED, called as a witness in behalf of the Relator, being first duly sworn, was examined and testified as follows:

(848) MR. VAN ARTSDALEN: If the Court please, may we request an offer of proof?

JUDGE MURPHY: After the witness is once identified, yes.

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Reed, where do you live?
A. Penn's Park, Pennsylvania.
Q. How long have you lived there?
A. About fifteen years.
Q. What is your business?
A. I am in the insurance business.
Q. Do you have any other businesses?
A. Well, yes, I guess.
Q. Well, what?
A. I hold the office of Notary Public and Justice of the Peace.
Q. And Justice of the Peace, what town is that in?
A. Bucks County.

JUDGE MURPHY: Now, will you make the offer, please. We are requiring it for the purpose of the record. We are re-

quiring this offer because, as we understand it, the Pennsylvania Supreme Court and the Circuit Court and the United States Supreme Court and this court has said that you shall not go back of the jurors. As we understand it, there has been a suggestion or (849-50) intimation that this gentleman has been in contact with a juror. Now, then, make the offer.

MR. MARGIOTTI: Now, Your Honor, this is the husband of a juror. He is not a juror.

JUDGE MURPHY: No, no. This is an attempt, as I understand it—as the Court understands it, and that is why we are asking for the offer or allowing the request for an offer—the question is asked: Did not this man on the stand have a conversation with the juror after she was selected as a juror and when she was supposed to be protected by the state? What is the offer?

MR. MARGIOTTI: All right. We now propose to prove by the witness on the stand that his wife, Anna Reed, was a juror in the Darcy case, that during the trial Mrs. Reed called him on the telephone, and that they had a telephone conversation which lasted three or four minutes, after which—and defendant was asked to bring to Mrs. Reed certain items, after which the witness proceeded to go to Doylestown with a child or two and some personal belongings of Mrs. Reed, and he saw Mrs. Reed and conversed with her at a time when they were about six feet apart.

JUDGE MURPHY: All right.

MR. MARGIOTTI: This is for the purpose of contradicting the Respondent's testimony.

JUDGE MURPHY: What is the position of the commonwealth?

(851) MR. VAN ARTSDALEN: We object to the offer, Your Honor.

JUDGE MURPHY: It would appear to the Court this is a backhanded way to get into the door precluded by the Court, but to avoid error we will permit it and let the Appellate Court pass on this as a matter of law, but it looks like a backhanded entrance to the door that is closed, but we will take it.

MR. MARGIOTTI: I do not know how you can prove this except by some other person.

JUDGE MURPHY: The Court has ruled.

MR. MARGIOTTI: There is nothing backhanded as far as I am concerned, I assure you.

Q. Mr. Reed, was your wife on the Darcy jury?

A. She was.

Q. And while she was on the jury did you hear from her?

A. Yes.

Q. How?

A. First by telephone.

Q. She called you on the telephone—pardon me. Who called you on the telephone?

A. I think Mrs. Van Sant called me on the telephone.

Q. Yes, and who was put on the phone?

A. My wife.

Q. How long did you talk to your wife?

(852) A. I would assume—I don't know. I would assume—I don't know, I didn't time it. I assume two or three minutes, I don't know, maybe four. I don't know exactly.

Q. Well, as a result of that conversation—strike that out. Did you recognize your wife's voice?

A. Yes.

Q. Had you talked to her on the telephone before?

A. You mean ——.

Q. Your wife.

A. You mean before the trial?

Q. Yes, before that.

A. Yes.

Q. As a result of that telephone conversation what if anything did you do?

A. I got some of Mrs. Reed's personal things in a suitcase and took them to the Doylestown Inn.

Q. When you took them to the Doylestown Inn did you see Mrs. Reed?

A. Merely by accident I saw her, yes.

Q. How close did you come to her?

A. Oh, I would assume six to eight feet. I wouldn't—that is just a rough estimation.

Q. Did you talk to her?

A. Well, merely said hello I guess. We had no immediate (853) conversation. Mrs. Van Sant was present.

Q. You had no extended conversation?

A. No.

MR. VAN ARTSDALEN: No. That is not the testimony, if the Court please.

Q. You had no conversation at all?

JUDGE MURPHY: The objection is sustained.

Q. Did you have any at all?

A. I think Mrs. Reed asked me a question about the child.

Q. What did she say to you?

A. She asked me how she was and one thing is, who combed her hair.

Q. Who combed the child's hair?

A. Yes.

Q. Did you reply?

A. Yes, I did.

Q. What did you say?

A. I said I did of course.

Q. Was there anything else said that you recall?

A. No.

Q. Now, in this telephone conversation that you had with Mrs. Reed, do you know whether there was any other person on the telephone at the time?

A. I don't know. I assume Mrs. Van Sant was right there.

(854) Q. Right where?

A. By the phone.

Q. Do you know whether she was?

A. Well, she was on the phone prior to Mrs. Reed. So I assumed she was right there.

Q. But do you know she was there?

A. No.

MR. MARGIOTTI: All right. Cross-examine. Well, just a minute.

BY MR. MARGIOTTI:

Q. Oh, did you deliver the personal effects?

A. Yes, I did.

Q. Who did you deliver them to?

A. I set them down as soon as I saw that Mrs. Reed and Mrs. Van Sant were right next to the hotel door. I did not go any nearer. I set them down.

Q. Did you see any person picking them up?

A. No.

MR. MARGIOTTI: They may cross-examine. I am through.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Reed, are you here subject to a subpoena?

A. Yes, I am.

(855) Q. Do you know how it came about that the counsel for the Relator found out about this?

A. Not exactly I don't.

Q. What knowledge do you have regarding that?

A. Well, sometime after the Darcy trial a couple members of his family came to my home to talk to Mrs. Reed.

Q. A couple members of whose family?

A. Darcy's family.

Q. All right. Go ahead, sir.

A. They called on my home.

Q. Were you present at that time?

A. Yes. I was.

Q. Was it then that this came about?

A. Yes.

MR. MARGIOTTI: What came about, this?

JUDGE MURPHY: Do you object?

MR. MARGIOTTI: I object to that, Your Honor.

JUDGE MURPHY: Overruled. You will have a chance to develop it.

MR. MARGIOTTI: What he means by "this."

JUDGE MURPHY: I hope counsel will clear that up.

Q. Was it at that time that this information that you have just testified to on the stand was given to members of the Darcy family?

(856) A. Yes.

Q. Do you know about when that was, Mr. Reed?

A. I think it was March 25 of 1951.

JUDGE MURPHY: May I ask counsel, is the Reed affidavit that the Court was ordered to strike from the rolls, was it part of the papers submitted by counsel for the Relator?

MR. RYDER: Yes, sir.

MR. MARGIOTTI: What is this?

JUDGE MURPHY: Was the Reed affidavit part of the affidavit that you submitted before but we were ordered to strike from the rolls? That is my question. The Circuit Court in its mandate ordered us to strike it from the rolls.

MR. MARGIOTTI: It was not an affidavit. It was a statement.

JUDGE MURPHY: It was Mr. Reed's statement that we were ordered to strike from the rolls.

MR. MARGIOTTI: It does not concern this thing.

JUDGE MURPHY: I do not know.

BY MR. VAN ARTSDALEN:

Q. At that time was any letter given to the members of the Darcy family?

A. Yes. There was.

JUDGE MURPHY: There is nothing in the statement of Anna L. Reed regarding whether or not she talked to her husband (857) on the phone or who delivered her clothes.

MR. MARGIOTTI: That is right, and we do not contend there was.

JUDGE MURPHY: All right.

BY MR. VAN ARTSDALEN:

Q. You say first you received a call you believe from Mrs. Van Sant?

A. That is right.

Q. Did you know Mrs. Van Sant's voice at that time?

A. Well, I never talked to Mrs. Van Sant on the phone, but I had seen her, and wasn't sure it was her voice, but I would assume it was her voice. I thought it was her voice.

Q. The voice identified itself as being Mrs. Van Sant?

A. Yes.

Q. When was it that you got that call, Mr. Reed?

A. I would say that it was the second day that Mrs. Reed was on the jury.

Q. And about what time was it?

A. I think it was around lunchtime. I am not sure of the time. I don't remember exactly.

Q. When was it that you brought the clothing to your wife?

A. That evening.

Q. What did you bring to her, please?

A. Well, her personal clothing, and stockings, and so forth.

(858) Q. Any reading matter brought?

A. No.

Q. When was it—what time was it when you brought it into the Doylestown Inn?

A. I would assume it was right after dinner. I don't know the exact time. I would say 7 or 7:30.

Q. But I believe that you stated it was merely by accident that you saw your wife. Would you elaborate on that a little bit, if you will?

A. As I recall the jury was in the lobby of the Doylestown Inn. I assumed they were going out or had just gone in, and when I arrived at the porch Mrs. Reed recognized me, I think, because she and Mrs. Van Sant came towards the door.

Q. Was Mrs. Van Sant in your immediate presence with Mrs. Reed at all times?

A. She was alongside of Mrs. Reed all the time.

Q. Any conversation that took place between you was heard by Mrs. Van Sant, is that correct?

A. That is correct.

Q. Was there any conversation at any time between you and your wife—strike it out.

Was there any conversation at that time between you and your wife relative to the Darcy case?

A. There was not.

(859) Q. Was there any conversation beyond that which you have already related to us?

A. No.

Q. Did you leave the clothing?

A. Yes.

Q. Do you know whether you handed it to Mrs. Van Sant or to your wife?

A. I think I set it down on the porch.

Q. How far away were you from your wife?

A. Well, I would assume the porch of the Doylestown Inn

isn't too long, and I would assume six or eight feet. I don't know, maybe ten.

Q. It may have been ten feet you say?

A. It may have been.

Q. Could it have been as much as twelve feet?

A. That is right.

Q. Did this take place out on the porch of the Doylestown Inn?

A. Well, I was on the porch of the Doylestown Inn, but Mrs. Reed and Mrs. Van Sant were inside the door.

Q. In the lobby?

A. Yes.

Q. Did your wife come out of the Inn at that time?

A. No.

Q. Did you go into the Inn at that time?

(860-861) A. No.

Q. Do you know what the two members of the Darey family told you that contacted you?

A. I think Joseph.

Q. Well, let me ask you this: Do you see them here in court today?

A. Yes.

Q. Will you point them out?

A. Joseph, and Jean is not here; she was here this morning.

Q. All right. Who was it that subpoenaed you, sir?

A. Joseph.

Q. What did Joseph Darey say to you last night when you were subpoenaed?

A. He asked me if I would come here and testify, and I told him that I didn't want to.

Q. All right. Did he say anything to you about your wife being under subpoena?

A. Yes. He delivered a subpoena to her too.

Q. He did deliver a subpoena to your wife?

A. Yes, sir.

Q. During the telephone conversation--when the telephone conversation took place, first with Mrs. Van Sant and then your wife, what did she say or what was the conversation?

A. Well, it was merely she told me what she ordered me to
(862) bring and where it was in the house.

Q. Was there any conversation relative to the Darcy case at all?

A. There was not.

Q. Was there at any time from the time that she was sworn as a juror until after she was dismissed?

A. No. There was not.

Q. And since you were subpoenaed by Joseph Darcy has he discussed this matter with you?

A. Well, yes, I would say he has.

Q. Did he today outside?

A. Yes.

Q. Did he at lunchtime?

A. No, not at lunchtime.

MR. VAN ARTSDALEN: That is all, sir.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Reed, you say your wife was subpoenaed?

A. Yes. She was.

Q. And last evening were you told that she did not have to come--not to come?

A. Yes.

Q. Who called you and gave you that information?

A. Joseph Darcy.

(863) Q. Joe Darcy?

A. Yes.

Q. Joe Darcy, and then she has not come here to court?

A. No.

Q. This morning when you came in, did you meet with me?

A. Yes.

Q. Did you tell me substantially the same that you told on the witness stand?

A. I hope so.

Q. That is right. That was over in the Hotel Casey in the lobby?

A. Yes.

MR. MARGIOTTI: I think that is all, Mr. Reed.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Reed, just one other question. Do you mean that after Joseph Darcy subpoenaed your wife, subsequently or later last night there was a telephone conversation that she did not have to obey that subpoena?

A. Yes, there was.

MR. VAN ARTSDALEN: All right. That is all, sir.

(Witness excused.)

JUDGE MURPHY: Call your next witness.

MR. MARGIOTTI: What is that, Your Honor?

(864) JUDGE MURPHY: Any other witness?

MR. MARGIOTTI: Your Honor, I would like to have some time to prepare these interrogatories. I would like to do it this afternoon or this evening.

JUDGE MURPHY: If there are any other witnesses to be called the Court is open for business.

MR. MARGIOTTI: I have no other witnesses in court except that I may want to cross-examine some more Mr. Curtin.

JUDGE MURPHY: This is the opportunity to do it.

MR. MARGIOTTI: I do not have the record with which to do it because I do not want to ask a question unless I have the record before me.

JUDGE MURPHY: What record is it?

MR. MARGIOTTI: It is a record of the Pardon Board of Pennsylvania in which his language was taken down verbatim about which I asked him this morning, but I cannot ask him particularly about that and about that without having the record, because I want to contradict him.

JUDGE MURPHY: Do you say, sir, as an officer of the court, that it was the practice at the time that you appeared before the Board of Pardons in 1951 in the Darcy case to have a stenographic transcript of everything that was said in that record?

MR. MARGIOTTI: I do not know whether the practice (865-866) prevailed at that particular time.

JUDGE MURPHY: Can you find that out?

MR. MARGIOTTI: I put that practice in order when I was Attorney General.

JUDGE MURPHY: Were you the Attorney General at the time you appeared before the Pardon Board in 1951 in the Darcy case?

MR. MARGIOTTI: I was not there as Attorney General. At that time I was there as an attorney, and I cannot answer that, Your Honor; but I can say this to you. I talked to Harrisburg this morning, and I have learned that they followed the practice after I left, and that they had the notes of testimony transcribed after each hearing and made a part of the record in each case.

JUDGE MURPHY: Are the notes on the way to Scranton?

MR. MARGIOTTI: That I do not know, but they will be on their way to Scranton if they are not.

JUDGE MURPHY: Have you any other testimony except that?

MR. MARGIOTTI: That, and perhaps calling Judge Biester. Your Honor has indicated that I may call Judge Biester as my witness.

JUDGE MURPHY: I say, sir, you will make the choice.

MR. MARGIOTTI: Yes. If I am to call him as my witness; I would like to call him as my witness but as if under cross-examination, however; I do not think that a person can (867) file an affidavit such as was filed in this case. Then must I call him as my witness, the adverse party call him as a witness, and be bound by his testimony?

JUDGE MURPHY: Are you making any motion?

MR. MARGIOTTI: At this time I move that I be permitted to call Judge Biester for cross-examination under the affidavit which he filed.

JUDGE MURPHY: Have you any authority?

MR. MARGIOTTI: This is all new to me. It comes up to me as a new impression. If I had any authority I would give it to you but I have not.

JUDGE WATSON: He is in no sense a party in any way?

MR. MARGIOTTI: No.

JUDGE WATSON: He is not a party to this action?

MR. MARGIOTTI: No.

JUDGE WATSON: Under what theory do you call him as for cross-examination?

MR. MARGIOTTI: Because he should have been called as a witness by the party that called him, and in place of calling ——

JUDGE WATSON: Should have been called by the person what?

MR. MARGIOTTI: Should have been called as a witness by the party that produced the affidavit.

JUDGE WATSON: Under the Act he has this privilege.

(868) MR. MARGIOTTI: I agree with you, but since he substituted an affidavit for the witness I believe I should be given the right to cross-examine the witness. I may be wrong.

JUDGE MURPHY: We understand then that counsel has now requested the Court that in view of the fact that a judge of the Court of Common Pleas of Pennsylvania and at present a judge, has given an affidavit, that in this civil proceeding he should be given the authority, not to call and question the judge, but to call him as a hostile witness and for cross-examination or an adverse party, is that it?

MR. MARGIOTTI: Well, I call him for cross-examination because he produced the affidavit for the opposition.

JUDGE MURPHY: All right. We will take a look at the civil rules. Do you want to say anything? There is a civil rule which says something about calling adverse parties and the like. It would be our judgment that there is nothing that would require any—considering the witness hostile. We will take a recess for ten minutes.

MR. RYDER: That is Rule 43 b, Your Honor.

JUDGE MURPHY: Yes.

(Recess taken.)

(David Darcy present in the court room.)

JUDGE MURPHY: Mr. Reporter, will you read the request that has been made?

(Record read.)

JUDGE MURPHY: We understand the request is that (869) Judge Biester be called as if for cross-examination ——

MR. MARGIOTTI: If Your Honor please, not "as if for cross-examination"; for cross-examination.

JUDGE MURPHY: Well, the reporter read the record. All right. There is a request now that Judge Biester be called for cross-examination.

MR. MARGIOTTI: That is right.

JUDGE MURPHY: The Court has before it Rule 43(b) of the United States Rules of Civil Procedure: (Reading).

"A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

The Court will hold that they will not characterize Judge Biester as an unwilling nor a hostile witness, nor will we characterize him as an adverse party, or an officer, director, or managing agent of a public or private corporation, or of a partnership or association which is an adverse party.

We will say to counsel that they have the choice (870) to decide whether or not they desire to call Judge Biester. If they call Judge Biester they will call him as their witness. As to whether or not they may ask him leading questions, if the questions are asked, and there is objection to them at the time, we will rule on the propriety of each question seriatim.

MR. MARGIOTTI: Your Honor, I am not concerned much about the leading questions. I said if I am bound by the answers to the questions. I am not concerned as to whether or not I will ask leading questions. I am more concerned as to whether I am bound by his answers.

JUDGE MURPHY: I meant to say to you, sir, if he was called and he testifies, we will consider him as a witness. We will pass upon his credibility, and we will pass upon what facts he adduces. But merely by calling him, if you have him say one thing and it contradicts what the testimony was on your side, because he says it does not make it so. The ultimate ruling will be the credibility of the witness as it strikes the judges; but you will not be bound by any technical rules, that merely because you call him as your witness you will have to develop everything he says. We will pass upon the questions as they are asked.

MR. MARGIOTTI: That clears it up.

JUDGE MURPHY: Now, if he is called as a witness, as to whether or not you can follow it, after having the evidence and having him in court you can follow it by interrogatories, ruling reserved.

(871) MR. MARGIOTTI: Well, if Your Honor please, it is now within five minutes of adjourning time.

JUDGE MURPHY: The Court has not said what time adjournment would be, sir.

MR. MARGIOTTI: I am assuming it is 4:30. I would like to see whether or not we can handle this matter by interrogatories. If we can it will solve the problem. If it cannot

we will call him as a witness. I do not like to inconvenience the judge.

JUDGE MURPHY: Do I understand that the testimony, insofar as the respective parties are concerned, is closed with the exception of a decision as to whether or not you are going to submit interrogatories to Judge Biester instead of calling him as a witness, and No. 2, until you are afforded an opportunity to have the record of the Board of Pardons at a hearing sometime or other, which has not been fixed at all so far as this record is concerned—as to sometime when Mr. Curtin appeared there on one occasion or other is not in the record, and then being afforded the opportunity of cross-examination? We ask when did Mr. Curtin appear before the Board of Pardons?

MR. MARGIOTTI: Well, my opinion is it was in May or June, possibly June of ——

JUDGE MURPHY: 1949, 1950, 1951?

MR. MARGIOTTI: 1950.

JUDGE MURPHY: 1950?

MR. MARGIOTTI: 1950. When did Governor Fine take (872) office?

JUDGE MURPHY: When did you leave? He could not be there while you were there?

MR. MARGIOTTI: I was there when Fine was in office.

JUDGE MURPHY: But he did not get there until the second year after you left, or the third.

MR. MARGIOTTI: That is before I left.

JUDGE MURPHY: He did not make the statements while you were on the Board of Pardons.

MR. MARGIOTTI: It was before I became Attorney General. It was before I was appointed by Jim Duff.

JUDGE MURPHY: The case came about after you were Attorney General. Then you became counsel.

MR. MARGIOTTI: No.

JUDGE MURPHY: I am trying to help you fix the date.

MR. VAN ARTSDALEN: Your Honor, I do not know whether this is in order ——

MR. MARGIOTTI: I would say it was June, 1951.

MR. VAN ARTSDALEN: I do not know whether this is in order at this time or not, but if the purpose of getting those records is to impeach the credibility of Mr. Curtin, as I recall his testimony, and I may be incorrect; Your Honor, it was to the (873) effect that he did not recall what he said before the Board of Pardons.

JUDGE MURPHY: But Mr. Margiotti now intimates to the Court that what Mr. Curtin testified to here under oath, frankly contradicts what he said to the Board of Pardons, to the effect that Mr. Margiotti says, by innuendo and suggestion, that before the Board of Pardons Mr. Curtin said these cases were not called one after the other but there were intervals of several weeks between them, which would frankly contradict

the record. So the good faith, the bias, and the prejudice of this witness is challenged or asserted, and we are entitled to it to see how much weight to give it.

MR. MARGIOTTI: Without dictating when we shall adjourn ——

JUDGE MURPHY: Well, the Court will adjourn from now until 10 o'clock Monday morning.

MR. MARGIOTTI: Oh, Monday.

JUDGE MURPHY: Yes.

MR. MARGIOTTI: I thought you were going to go on tomorrow.

JUDGE MURPHY: No. We thought you were going to close today, and Judge Watson made other arrangements. So we will adjourn until 10 o'clock Monday morning.

Let me say this, that we realize that the people of Bucks County have been seriously inconvenienced, and the people of (874) Philadelphia have been seriously inconvenienced, and the people from Harrisburg, Pittsburgh, and points west. You are here making money. We cannot call that inconvenience. Lawyers are in business, but there are other people, and Judge Watson will be happy to re-arrange his schedule so that the hearing will go on at 10 o'clock tomorrow morning, and we hope to conclude this matter tomorrow as far as testimony is concerned. So that we will adjourn to 10 o'clock tomorrow morning, Saturday morning, instead of Monday morning. Is that clear to everybody? 10 o'clock tomorrow morning, and we hope by that time those papers are here from Harrisburg. The Court has driven it up and back all in one night. All right, 10 o'clock tomorrow morning.

(Whereupon at 4:30 o'clock p.m. an adjournment was had to Saturday, March 20, 1954, at 10 o'clock a.m.)

(875) (Court resumes on Saturday, March 20, 1954 at 10:05 A. M. with all parties, including the Relator, David Darcy, present in Court.)

BY JUDGE MURPHY: The Court would like to make a statement, gentlemen.

Yesterday during the course of the discussion as to whether or not we would admit the evidence of the witness Reed, we were confronted, of course, with the Mandate which told us to strike them out and not refer to it. We want to state on the record that we reiterate we don't want to get away from the command of the Appellate Court. So that we were troubled as to whether or not we should go into the Reed testimony at all, and we used the word "backhand," We should have said "indirect." It was not a question of criticizing you, sir. It was a question of trying to comply with the command of the Appellate Court.

A more serious problem is confronted by what occurred later in the afternoon. As we understand the law, the burden is upon the Relator to establish his right to the discharge by the preponderance of the evidence, and the Court that tried this case was a State court. We are a Federal Court here only because of the Constitution of the United States. It is not our concern particularly what the record is, good, bad or indifferent. We are supposed to call the shots as we see them.

Now then, there is a provision in the Act and the provision is to the effect—Section 2245:

"On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts oc-

curring at the trial, shall be admissible in evidence." Copies of the (876) certificate shall be filed with the court in which the application is pending and in the court in which the trial took place."

Now we don't think it is our duty to inquire whether Judge Keller filed a copy of the paper down in his own court. I think that would probably be so that the record in his court would show exactly what happened. But it does read ". . . setting forth the facts occurring at the trial . . ."

There was an objection made by Mr. Margiotti at the time that this was all embracing and that it covered matters that were not properly included therein.

As to that paper, we say that we have received it in evidence, and it may well be that parts of it are not properly before this Court for admission by this Court, parts of it are, and it will be the duty of the Court in handling it to winnow out—to separate the chaff from the wheat, or the proper from the improper.

Now, more serious than that, Section 2246 says:

"On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits."

Now, the leading case in the books appears to be the case of Walker v. Johnson, and as we read that case—312 U. S. 275—now there at Page 286 says Mr. Justice Roberts:

". . . On a hearing he would have the burden of sustaining his allegations by a preponderance of evidence. It is true that they are denied in the affidavits filed with the return to the rule, but the denials only serve (878) to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination ore tenus or by deposition as are all other witnesses. Not by the pleadings and the affidavits; but

by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence . . ." The last part not particularly appropriate, but the other—yes.

Now then, we call your attention to the case of Moses v. Hudspeth, 129 F. 2d 279 at 280.

"The further contention is that an ex parte affidavit of the United States Attorney at Cleveland was improvidently admitted in evidence. The parties stipulated that the depositions of the United States Judge at Cleveland, an Assistant United States Attorney, a former Assistant United States Attorney, a deputy clerk, and others there should be taken. They were taken and introduced in evidence. The stipulation did not make any reference to the taking of the deposition of the United States Attorney, but it was taken along with the others and was introduced in evidence. Issues of fact in a case of this kind cannot be established by ex parte affidavits . . ." and they cite Walker v. Johnson. They say there: ". . . But the evidence in question was not in that form.

(878) Now, the next case is McGinley v. Hudspeth, 129 F. 2d 523. They say in that case:

"The government introduced in evidence an affidavit of the Assistant United States Attorney for the District of Nebraska in which certain facts were detailed relating to the proceedings had in the two criminal cases. Proof which is requisite in a proceeding in habeas corpus to secure discharge from confinement after conviction for crime cannot be supplied by an ex parte affidavit . . ." citing Walker v. Johnson. ". . . But the error in admitting the affidavit was harmless, for the reason that the petition for the writ failed to state a cause of action . . ." That is not our problem.

Now then, yesterday we did admit in the light of our best

reasoning then the affidavits after a cursory or rather quick reading of the statute; and then the question came up as to what the procedure should be. We don't think that it is the right or duty of the Court to dictate to either side as to whom they shall call as witnesses. The Commonwealth can call whom they please; the Relator can call whom he pleases.

If the Court were to receive the affidavits as evidence, then the Court would have this situation: There are cases in the books that say you don't have to be confronted with witnesses, but, nevertheless, in the last there is a situation where you would have an affidavit coming in and averments made upon which the trier of the facts is going to rely in some respects or other if the situation warrants it without that person being subjected to cross-examination.

Now then, yesterday we had the problem in reading from the Civil Rules as to whether the other would want to—the (879) witness was hostile or otherwise. Certainly, the witness would be adverse to the interest of the Realtor if he states facts which Relator challenges by other testimony.

Now then, unless there is some reason in the law the Commonwealth can show us, we are prepared to strike the affidavit of Judge Biester from the record and let counsel for the respective sides make what, if any approach, they desire to make on that phase of the case.

BY MR. RYDER: The affidavit of Judge Biester was offered yesterday pursuant to Section 2246 of the Revised Judicial Code, 28 United States Code, Section 2246, which was enacted following the decision, namely, Walker v. Johnson, which you have read, and it was enacted for the express purpose for which it was utilized in this case.

BY JUDGE MURPHY: Under Section 2245 they say there is no doubt about it. Justice Robert's decision was in 1941,

and the Act was in 1948. But under Section 2246 there is this Reviser's Note:

"This section is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Summers of the House Committee on the Judiciary. It clarifies existing practice without substantial change . . ."

BY MR. RYDER: I was coming to that portion of my argument.

BY JUDGE MURPHY: All right.

BY MR. RYDER: At the time—to give you a little background, if I may—(880)—this situation was presented to the Supreme Court of the United States and reargument of the Attorney General of Pennsylvania in Smith v. Baldi was argued in the same term of the Supreme Court as Brown v. Allen, 344 U. S.—immediately following Brown v. Allen, and I think I have always felt in my own mind since the rendition of the Opinion in Brown v. Allen, Footnote 19—Brown v. Allen, 344 U. S. 464—I have the Court's copy—this footnote reads as follows, among other things:

". . . Other sections strengthen the ability of the court hearing the application fully to advise itself concerning prior hearings of the same issues for the applicant. 28 U. S. C. Section 2245 allows a certificate as to certain facts; Section 2246 provides for depositions and affidavits. Section 2247 makes liberal provision for the use of records of former proceedings in evidence. See also Sections 2248-2254, inclusive. Of course, the other usual methods of completing the record in civil cases, such as subpoena duces tecum and discovery, are generally available to the applicant and respondent . . ."

Now the offer of the affidavit of Judge Biester was predicated entirely on Section 2246 and Footnote 19 of the Opinion

of the United States Supreme Court in the case of Brown v. Allen.

BY JUDGE MURPHY: Obiter dictum.

BY MR. RYDER: We felt it was dictum in the way of direction to the Trial Court.

BY JUDGE MURPHY: Notwithstanding the decision in United States v. Baldi ——

BY MR. RYDER: (881) The Opinion that has been read is Brown v. Allen.

BY JUDGE MURPHY: Notwithstanding the footnote, in view of the previous decisions and in view of the footnote, the Reviser's Note that goes with Section 2246, and in view of the fact that we are here trying to find out exactly what happened there and that the receipt of the affidavit confronts the Court with the situation of it being offered to determine an issue of fact and then we have the situation where there doesn't appear to be any rule as to what the right of the other side is, under the circumstances we think justice will be done by saying that the affidavit as such will be rejected, that we will not receive the affidavit as proof of the facts contained therein. That has no prejudice whatsoever to the rest of the affidavit—to the rest of the record. As to any averment of fact contained in the affidavit, if any support is to be given to those averments it will have to be through testimony, of course.

BY MR. RYDER: Is it necessary to note an exception?

BY JUDGE MURPHY: To which you ask an exception—yes sir.

Now then, certainly for the purpose of the record, this paper will remain to show what we have rejected. That is "Respondent's Exhibit No. 6," the Biester affidavit.

BY MR. VAN ARTSDALEN: In view of the Court's ruling, we ask leave to take off our rest and to reopen our case. I might say I have consulted with Judge Biester and he has expressed a willingness to testify.

BY JUDGE MURPHY: All right. You have no objection, do you, to striking off the rest?

(882) BY MR. MARGIOTTI: I think it can be stricken at the discretion of the Court.

HONORABLE EDWARD G. BIESTER, called and sworn on behalf of the Respondent, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Where do you reside, sir?

A. Doylestown Borough, Bucks County.

Q. How old are you?

A. Fifty-one.

Q. What is your present occupation?

A. Judge of the Common Pleas and associated courts of Bucks County, Seventh Judicial District of Pennsylvania.

Q. How long have you been Judge of that district?

A. Since August [illegible] 1949. I believe the date is August 16, but I haven't refreshed my recollection of it.

Q. Were you originally appointed or elected to that office?

A. I was appointed to that office.

Q. By whom?

A. By the then Governor.

Q. Were you elected subsequently to the office of Judge?

A. I was.

Q. On what date, sir, or what year?

A. 1952—1951, I believe.

Q. Will you state whether or not prior to your appointment as Judge you were recommended for that appointment by the Bucks County Bar Association?

BY MR. MARGIOTTI: We object, being immaterial.

BY JUDGE MURPHY: We will take it.

BY MR. MARGIOTTI: I will withdraw the objection.

(883) BY THE WITNESS:

A. I was.

BY MR. VAN ARTSDALEN:

Q. Will you state whether or not that was unanimous?

A. It was.

Q. Prior to being appointed Judge, what was your occupation, sir?

A. Attorney at law and District Attorney of Bucks County.

Q. When did you first become District Attorney of Bucks County?

A. 1938.

Q. Was that an appointment or by election?

A. By election.

Q. Were you District Attorney from 1938 continuously up until the time of your appointment as Judge?

A. I was.

Q. Prior to being District Attorney did you hold any other official position with the County of Bucks?

A. Assistant District Attorney.

Q. For how many years were you Assistant District Attorney?

A. Six years.

Q. Now you were the District Attorney then at the time of the Feasterville killing?

A. I was.

Q. And were you District Attorney from then up until and through the time of the trial of David Darey?

A. I was.

Q. Did you personally investigate the killing that occurred on December 22, 1947?

A. I personally investigated in association with the County Detectives office and the Assistant District Attorney. It wasn't a personal investigation completely.

(884) Q. Did you try both the Foster-Zietz case and the Darey case?

A. I did, with the assistance of my assistant, Willard S. Curtin.

Q. Were you the person who scheduled the dates for the trials of those two cases?

A. I was.

Q. Now, will you tell us, please, as to the trial of David Darey—first, when did that trial begin?

A. I haven't looked at the notes, but from the testimony yesterday I gather the examination began June 7.

BY MR. MARGIOTTI: I don't object to telling him that is the date. We agreed already to that.

BY MR. VAN ARTSDALEN:

Q. Will you tell us, please, your recollection of how the jury was selected?

A. How they were called into the box.——

Q. Yes sir.

A. My best recollection is the jury once assembled in the main courtroom, the roll having been called and marked by the Clerk of Quarter Sessions on the form which is already in evidence but I don't know the number of the exhibit, the jury then retired to another place. Each juror was brought in separately and interrogated on the voir dire. I believe that after several—possibly one or two or three—jurors had been selected on the voir dire and had taken their place in the jury box, that we then had that portion of the jury, which whatever it might have been selected, then retired to another room and then called additional witnesses or additional jurors on the voir dire and as selected by both counsel—approved by both counsel they joined their fellows until twelve were selected when there was a motion that two alternates be selected, and that was done.

(885) I don't know whether that is responsive to the question, but that is as I understand it to be.

Q. Are you familiar with the location of the furniture, chairs, tables, etc., that were in the courtroom during the time of the Darcy trial?

A. I am.

Q. I want to show you "Relator's Exhibits Nos. 118, 119, 120, and 121 and ask you, please, sir, whether they accurately depict the conditions presently existing in the Bucks County Courthouse, Courtroom No. 1?

A. They do.

Q. Will you tell us or point out, please, what, if any, changes you note in those pictures from the conditions that existed at the time of the Darcy trial?

A. I don't recall any, except that I believe that the witness' box was somewhat changed since that time, the method of entrance into the box being at that time from the one side different than where the entrance now is, and a small platform having been added at that time. I don't recall any other changes. I suppose as to detail—there is a picture here that wasn't here at that time.

Q. What about the tables, sir?

A. I don't recall any change whatever in the location of the tables.

Q. Might I call Your Honor's attention to the three chairs for the Judges. Is there any change there?

A. Yes. At that time there having been but two Judges, there were but two chairs.

Q. Will you tell us, please, what you know of the manner in which the defendant was brought—that is the Relator in this case—was brought into the courtroom and taken from the courtroom?

A. In each instance he was brought in, to the best of my (886) recollection, through the rear entrance. There is a parking lot immediately adjacent to the courthouse edifice itself. The Sheriff, accompanied by, I believe, two State Policemen and possibly with the Warden of the jail also present, would bring the prisoner to that parking lot; he would then be removed from the automobile and taken in the back way of the courthouse. May I add this—that, of course, that was not under my constant observation. I saw Mr. Darcy brought there but not everyday, but I did know that he entered through the door from the rear of the courtroom when he was brought into Court, as distinguished from being brought in from the front of the courthouse.

Q. What personal knowledge do you have, sir, of the arrangements that were made for taking care of the members of the jury that were selected?

A. Well, I recall that they were housed at the Doylestown Inn and that four tipstaves were appointed to have them in custody.

Q. Now during the course of the trial of David Darcy what, if anything, can you tell us regarding the presence of Judge Boyer in and about the courtroom?

A. My best recollection is that Judge Boyer did come in every morning. I, of course, could be mistaken in my recollection. There could have been some mornings he did not come in. But my best recollection is he came in every morning—if not every morning, almost very morning—and joined Judge Keller on the bench. Occasionally there was other Court business to attend to before the Darcy case attached, and then Judge Boyer would go to another courtroom for that purpose. He, of course, had his own duties to perform other than the trial or disposition of cases, (887) and he would return to his chambers which are immediately adjacent to the courtroom itself. And may I here interject that the only chambers in the courthouse are the chambers that were then occupied by Judge Boyer and now occupied by me. Neither Judge Keller, or now Judge Satterthwaite, has chambers in the courthouse.

Occasionally—and I confess lack of memory as to the exact number of times—he remained with Judge Keller on the bench for varying periods of time during the trial of the Darcy case. That would not be every day and it would not be, to the best of my recollection, for the length or duration of that particular session. But he was with Judge Keller sometimes—without specifically trying to fix those—he was sometimes with Judge Keller on the bench. On other occasions when not being on the bench and when not otherwise occupied he took a chair within close proximity of the doorway which enters from the chambers into the courtroom ——

Q. May I interrupt for just a moment. Could you point out, please, on "Relator's Exhibit No. 135" your best recollection of where that chair was located?

A. There is presently a marking on the exhibit "Judge Boyer." I would say it was that chair or one immediately in that vicinity, possibly the one adjacent to it, but one of those several chairs.

Q. And while the exhibit is presently here, could you tell us, please, approximately how far it is from the chair marked "Judge Boyer" chair to the nearest table?

BY MR. MARGIOTTI: I object to the question in that form. If the question was intended to ask the distance between the chair and the nearest table at that time, I have no objection.

(888) BY JUDGE MURPHY: The witness has already testified that there were no changes in the courtroom except those designated. In view of that, the objection is overruled.

BY THE WITNESS:

A. I would estimate it would be possibly eight or ten feet from that chair.

BY MR. VAN ARTSDALEN:

Q. Was it the same distance at the time of the Darcy trial?

A. To the best of my recollection, it was.

Q. Do you have any recollection at this time as to whether or not Judge Boyer was in the courtroom on Friday evening, the Friday evening session?

A. I do not recall his having been there.

Q. Do you recall—strike that. During the charge of the Court will you tell us, please, what you recall of the charge so far as your location in the courtroom is concerned?

A. My best recollection is that when the charge began, or very early in the charge, Mr. Curtin and I retired to the seats which are in front of the table nearest to the right of the sitting Court.

Q. Is that the table which has been identified by some persons as being a press table?

A. I heard Mr. Curtin refer to it in language that might be assumed to be a press table. That is the table I am referring to.

Q. Where was it again, sir?

A. There are three tables on the "Renator's Exhibit No. 135." One of the tables has what I presume are indicated to be fourteen chairs. Facing the jury we would be — or I would be in the (889) second or third chair nearest to the bench, the Court's bench.

Q. And were you seated there with any other person?

A. Mr. Curtin was there with me. I, of course, don't recall whether we were there for every moment of the charge but my recollection is we were there for a major part of the charge. Mr. Margiotti, I can't see Mr. Van Artsdalen.

BY MR. MARGIOTTI: I am sorry.

BY MR. VAN ARTSDALEN:

Q. Do you have any recollection of Judge Boyer being present in the courtroom during any portion of the charge?

A. I have not.

Q. Now you have been in Court here in this courtroom since what time, sir?

A. Yesterday at 10:00 o'clock in the morning.

Q. There has been testimony to the effect that during the charge a note was written and passed by Judge Boyer to you. Now, do you have any recollection of any such incident?

A. No recollection whatsoever.

Q. There has been testimony, sir, that after you obtained this note you immediately or very shortly thereafter got up and stood in front of the bar of the Court waiting to be recognized by the Trial Judge. Do you have any recollection of that, sir?

A. No. The question is rather interwoven. I remember arising in connection with the charge. I was refreshed in my recollection from testimony in that respect yesterday although I have not yet read the notes of testimony. I mean the last person here. But I do not recall having received the note, or any relation between my arising and the reception of the note.

Q. There has been testimony that there were magazines and (890) newspapers observed being read by the various spectators in the courtroom at various times in the Darcy trial. What, if any, recollection have you as to that, sir?

A. I must make it part of my answer of course my attention was not in a great measure devoted to observation of the spectators in the courtroom, but I do not recall during the trial having observed anyone reading a paper or a magazine.

Q. There has been specific reference that at least one of the sessions there were observed copies of this magazine in the courtroom. Do you have any recollection of seeing any such magazine?

A. What is the exhibit ——

Q. That is "Relator's Exhibit No. 136."

A. I do not recall having seen it.

Q. Were there any disturbances in the courtroom at any time during the trial of David Darcy?

A. I observed none.

Q. Was the courtroom at any time cleared by order of the Court?

A. It was not.

Q. There has been testimony that during the Foster-Zietz

trial at someting during that trial you spoke to a person who has identified herself, I believe, as an aunt—as a Miss Agnes Patterson, and ——

BY JUDGE MURPHY: That was the aunt of Zietz or Foster?

BY MR. MARGIOTTI: I think it is Zietz's aunt.

BY JUDGE MURPHY: That was during another trial and not the Darcy trial.

(891) BY MR. VAN ARTSDALEN: That is right.

BY JUDGE MURPHY: That was the stoutest lady on the stand—none particularly stout. The stoutest one that was on the stand.

BY MR. VAN ARTSDALEN:

Q. —— that during the course of that conversation with her you stated, in effect, that you were sorry that you had to say the things you did and that you would see that justice was done and that you would raise no objection before the Board of Pardons. Now, what, if anything, can you tell us of your recollection of any such incident?

A. I have no recollection of an incident of that kind unless at the time—and I would have to distinguish this—I want to be precise as near as my recollection permits—I talked to Foster, that is the defendant Foster's brother, outside of the vestibule, we did meet there, and doorway of the courthouse, and there was a woman with him at that time. In what place at the trial that took place, I have no recollection whatever. At that time Foster's brother asked me something to the

effect as what might be done in the event that these boys were convicted or if they had been convicted and received the death penalty. I might—I mean being selective at that time I might have told him—and that was just what an attorney would answer, but I do recall that I told him "The matter might be taken up with the Board of Pardons." I said nothing at that time—agreed in that conversation to the effect that I would not oppose in connection with the hearing before the Pardon Board for commutation of sentence or a reduction of sentence to life imprisonment. That is my best recollection. I don't know if that is the conversation (892) that is referred to or not.

Q. I believe that same witness, Your Honor, testified to the effect that when you came over to speak to her you were crying or had tears in your eyes, or something of that kind. Have you any recollection at any time during the Darcy trial of crying?

BY MR. MARGIOTTI: We object to the Darcy trial. There was no contention he had tears in his eyes during the Darcy trial.

BY JUDGE MURPHY: Do you amend the question?

BY MR. VAN ARTSDALEN: I will amend the question.

BY JUDGE MURPHY: Mr. Reporter, read the question as amended striking out the reference to the Darcy trial.

(Question read by the Reporter.)

BY JUDGE MURPHY: Reframe your question.

BY MR. VAN ARTSDALEN:

Q. At any time during the Foster-Zietz trial do you have any recollection of crying or having any tears in your eyes?

A. I have no recollection of it, Mr. Van Artsdalen.

Q. During the Darcy trial do you have any recollection of your closing speech to the jury?

A. In a general way, yes.

Q. Will you state whether or not you made any attempt to appeal to the emotions of the jury?

(893) BY MR. MARGIOTTI: I object as not an issue in this case.

BY JUDGE MURPHY: Well, in view of the situation we have been rather broad in allowing the evidence. We will take the answer subject to the objection. There has been no allegation that there was any appeal to the emotions of the members of the jury, but we will take the answer.

Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY THE WITNESS:

A. I did not.

BY MR. VAN ARTSDALEN:

Q. Throughout the course of the Darcy trial did you observe - were you on the public streets of Doylestown?

A. I was, but we were trying the case. When we were not trying the case, Mr. Curtin and I, we were often about there.

Q. Did you observe any disorders on the public streets of Doylestown?

A. I saw none.

Q. Will you state—tell us as to the number of persons that were on and about the public streets of Doylestown during the Darcy trial?

A. I have no independent or other recollection of there being more people assembled than are normally assembled during the weeks of Court trials.

Q. What, if anything, can you tell us as to the attendance of spectators at the trial of the Darcy case?

A. I can only say that the courtroom was never, to the best of my recollection—ever filled with people. There were a number (894) of witnesses present; there were a number of officers present; most of whom were witnesses. The courtroom was never full.

Q. Between the time of the shooting on December 22, 1947, up through June 15, 1948, do you know of any mass meetings or disturbances that were caused as a result of the shooting?

A. I know of none.

Q. Were any complaints made to your office as District Attorney concerning the same?

A. None.

Q. Now, Your Honor, there has been some questions raised in this case as to the reasons for the case being listed for trial when it was. What explanation do you have as to the times when these cases were listed for trial?

A. I must always preface or state this is my recollection of the situation, Mr. Van Artsdalen, in some parts of the answers I am certain. First, it should be understood there was at that time but two people in the District Attorney's office, the District Attorney and one assistant. In the trial of such a case as this we felt it preferable that the District Attorney and the Assistant both be present during the trial. This being so, it is obvious that we couldn't try other cases during the sametime, that is Mr. Curtin and I could not. I don't know the date of the Petition for Severance. My recollection is that it was after the Bill of Indictment was found, possibly in March ——

BY MR. VAN ARTSDALEN: If the Court please, I believe that the record which has been introduced into evidence will show that was on March 1, 1948.

BY MR. MARGIOTTI: (895) If you say that is correct, I have no objection.

BY THE WITNESS: After that time it appeared then that it was likely that three trials would take place. It became necessary for us to determine how they were going to be tried—if they were tried at separate terms of Court and extended for more than a week, then three months would be taken up; assuming Mr. Curtin and I sat together in the trial, when no other criminal cases could be attached. With that in mind and with the secondary matter in mind that one of the persons who was present in the tap room on that night was in serious physical condition—I believe his name is Hellerman—that these cases should be dispatched as promptly as was possible for the interests of justice so that we might be sure that that witness would be present, and the day after the severance we had conferences with counsel for the various parties and told them in what order the cases were to be tried. We didn't know whether the Foster-Zietz case we fixed first would take a week or more than a week, but it was then arranged, not during the week of the Foster-Zietz trial but considerably prior thereto, that when that case was completed, if it be completed during the first week, the Darcy case would follow the next week. If it wasn't completed during that week, then it would go on to the following week. That was, I will say, definitely determined prior to the time the Foster-Zietz case was attached.

Q. You have referred to a witness by the name of Allen Hellerman. Do you know what has since happened to him?

A. I have been advised that he is now dead.

BY MR. VAN ARTSDALEN: (896) Will the Court bear with us for just a moment?

Q. Do you have any recollection of the sidebar conference which appears in the record of the Darcy trial at which there was a colloquy between Webster Achey and Judge Boyer?

A. I had a recollection of it which I have refreshed by looking at the notes of testimony in that testimony which I had sometime, I believe, last week. I do recall the circumstances ——

Q. And will you explain those to us?

A. On that day of the trial Judge Boyer was sitting with Judge Keller. I did not refresh my recollection as to what day of the trial or the time of the day of the trial. There was some discussion of a point of law involved regarding evidence. Mr. Achey and I—and, I think, Mr. Power—stepped to sidebar where we argued without the hearing of the jury in low tones the question which was involved addressing ourselves to Judge Keller. During the course of the discussion Judge Boyer leaned over and made a point of some thinking in his mind to Judge Keller, and Mr. Achey then objected to Judge Boyer's having done so. Judge Boyer, I believe very shortly after that time left the bench first saying to counsel, however, that he thought the Court might confer without asking the acquiescence of defense counsel before doing so. Nevertheless, in view of Mr. Achey's remark, he left and I don't believe he returned during any time of the trial following on the bench with Judge Keller insofar as the trial itself was concerned.

Q. At any time during the Dargy trial did Judge Boyer assist you in any way in the presentation of the evidence in the trial of the case?

A. I have no recollection of such a situation at all, Mr. Van Artsdalen.

(897) BY MR. VAN ARTSDALEN: If it please the Court, that is all the questions we have of Judge Biester. I think if Judge Biester has any further statements to make to the Court in connection with this case, he should be afforded an opportunity to do so.

BY JUDGE MURPHY: If he desires to make a statement, he may.

BY THE WITNESS: I have no further statement to make unless there is some point or inquiry counsel or the Court is interested in.

CROSS-EXAMINATION.

BY MR. MARGIOTTI:

Q. Who did you say appointed you?

A. The then Governor.

Q. Was that Governor Duff?

A. Yes sir.

Q. And have you qualified before the people for election since that time?

A. I have been.

Q. You have been elected for a ten-year term?

A. I have.

Q. Judge, you testified that you were present when the jury was selected, is that right?

A. Yes.

Q. In your best recollection—or at least that testimony was to the effect that after one, two or three jurors had been selected ——

A. I would say so.

Q. He is saying three. That is the only reason I am saying

(898) three. If I am wrong, Judge, please correct me. After one, two or three had been selected they were taken out of the courtroom?

A. Yes.

Q. Where were they taken to?

A. Into a room adjacent to the courtroom itself.

Q. Was that the library?

A. It is one of the library—it might be called a library room.

Q. Is that the library immediately to the right where the jurors sat as shown in that sketch, "No. 135?"

A. There are two rooms ——

Q. Would you mind looking at that sketch? Do you see that room marked "Library"? What is that—"Attorney's Room"?

A. It is marked "Attorney's Room." I will try to explain that to you, sir. There are two rooms there. There is one that is called—we refer to it as the "Attorney's Room," although it is not part of the library in the sense that there are books there. There is a room immediately adjacent to it which is a library as distinguished from the "Attorney's Room."

Q. Was that the room that they were taken to?

A. The room I also referred to is the room, to the best of my recollection, where they were.

Q. Judge, after each juror was selected do you say the juror was then taken to this room to meet the other selected jurors?

A. I didn't say precisely that. I said after one, two or three had been selected that is what happened.

Q. That is right. You did say that. When Juror No. 4 was selected what happened to him?

A. Then he would join those others.

Q. That is what I meant.

(899) Now, do you recall that after three of the jurors had been selected that they were in their seats in Court when one of the jurors being examined on his voir dire made a statement that "This was one of the most cold-blooded murders he had

ever heard of," and to refresh your recollection, there was a motion then made for the withdrawal of a juror and a continuance of the case?

A. I remember that incident occurred, Mr. Margiotti, but I don't know whether it occurred prior to the time that those jurors then selected and accepted left the courtroom or not. I simply don't remember.

Q. If I were to tell you that the record shows that occurred after the third juror had been selected—or if I were to show you the record showing that, would that refresh your memory?

BY JUDGE MURPHY: You are talking about two different things—when the jury was taken out of the box or when the Westlake remark occurred. That is what you are asking about.

BY MR. MARGIOTTI: I will withdraw the question. I think the Court is correct.

Q. Have you looked at the record since that time, the voir dire of the jurors?

A. At the time of the appeal to the Supreme Court I know I must have looked at it.

Q. Like most lawyers, you might have forgotten it, too?

A. That is true.

Q. I am going to show it to you, Page 97.

A. What is the question?

(900) Q. I haven't asked you one yet.

A. I have looked at it.

Q. Isn't it a fact that the juror Westlake while three jurors who had been selected that were present in Court and seated in their chairs said "This was one of the most cold-blooded murders he ever heard of"?

A. There are two parts to it. I don't want to fence on it. I want to answer you as nearly as I can ——

Q. I know that.

A. I can recall that answer having been given in response to an inquiry, but I don't recall whether that was either before—was the occasion for or was after the time that method of having the jurors withdrawal take place.

BY JUDGE MURPHY: At Page 189—if you are looking for it.

BY MR. MARGIOTTI:

Q. Now, isn't it correct that after eight jurors had been selected that it was at that time that His Honor, the—isn't it correct that after eight jurors had been selected you asked that the jurors be segregated, those who had been selected?

A. I don't know and I don't recall. If that is what the testimony indicates, that must be so.

Q. Yes, it does, Judge, but I will let you read it. I don't want you to take my word for it. I will let you read the record. I am showing you Page 189—and you better read Page 190 too.

A. That apparently is correct, Mr. Margiotti.

Q. Then after eight jurors had been sworn and the entire eight had listened to the examination of other jurors on their voir dire—after that much had been sworn—you made the motion (901) in which you stated that:

"Yesterday during the calling of the jury on the voir dire one of the prospective jurors made a statement which Mr. Achey felt was inimical to his case . . .

and you then

". . . asked that the eight jurors who have been called in the box be excused so nothing of that kind can happen again . . ."

You were taking that precaution. Mr. Achey objected, saying that he didn't think there was precedent for locking up the jury or keeping them out of the courtroom after they had been asked

or accepted to sit in this trial; and the Court saying "They haven't been sworn," and that is all that took place. The Court did not lock them up, didn't take them to another room or did he deny your request. When you made the request, Mr. Achey objected; you made the request and Mr. Achey objected.

A. My best recollection is that some time—if the record discloses that my recollection is erroneous, it would stand—my recollection is still at some time during the course of the trial that arrangement was made.

Q. Isn't it a fact that the Court in answering the objection that was made—in answering that motion, simply said "They haven't been sworn," and took no further action?

A. I don't know what the Court said. My recollection is that obtained at some time during the course of the trial.

Q. I ask you to look at Page 190.

A. Yes.

Q. The Court said "They haven't been sworn," is that right?

A. That is right.

(902) Q. Now then, isn't it a fact that the examination of the jurors on their voir dire went on until the entire jury was selected in the presence of each one that had been selected?

A. I thought not, Mr. Margiotti, but it may have occurred as you suggested. I know there was some discussion about it. I thought the Court then had them removed to the other room.

Q. And, Judge, isn't it a fact that after the last alternate was selected, who would be No. 14, that the jury was sworn as a whole?

A. Yes; that is as I recall.

Q. And after they were sworn as a whole they were taken in to the lawyers' room or the library, or whatever room it was that you referred to?

A. You mean that was the first time it occurred—I mean I don't know whether they were taken to the lawyers' room or not, or whether we proceeded with the trial.

Q. Well, let me put it this way—this may refresh your memory: Isn't it true that they were all examined and those who were accepted took their places in the jury seats and after fourteen jurors were selected that there were two additional tipstaves sworn in and—Mrs. Van Sant and Mr. Gahman, and then the jury went out to the scene of the crime?

A. That occurred, yes.

Q. So that the jury did remain in the courtroom while all other jurors were being examined; so far as each particular juror was concerned, he would only remain for the ones that were selected after him, not for the ones before him, of course?

A. It is possible that occurred. I would not say with certainty one way or the other ——

(903) Q. Look at Page 70.

A. 270 ——

Q. 270.

BY JUDGE MURPHY: What page?

BY MR. MARGIOTTI: 270 and 272 and 271.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY MR. MARGIOTTI: I withdraw the question.

Q. So that each juror remained in the courtroom after being selected listening to all subsequent voir dire examination until the jury was selected? That is what I had in mind.

A. That may be so. My recollection was to the contrary.

Q. I appreciate that. I am not saying that we deliberately made a misstatement. From that record now since you have looked at that record and you have looked at Pages 270, 271 and 272, what do you say?

A. What do I what ——

Q. What do you say since you have looked at the record?

A. I would say that after the jury was in the box ——

Q. Go ahead. I don't care to have you read what is there except to yourself and then give me your view—your answer to the question as propounded ——

BY JUDGE MURPHY: As we understand it, the problem is this: There were some jurors who were selected whereupon Mr. Westlake, called (904) as a prospective juror, made some remark, and then there was a motion for the withdrawal of a juror because of the remark; the motion was denied and the three jurors selected cautioned not to pay attention to it, not to follow it, whereupon they called additional jurors and when eight jurors were selected you came into Court the next day and moved that the eight be placed in another room until the completion of the voir dire of the remaining four and the other two subsequently was completed.

The record does not show in the transcript of testimony whether the jury, the eight, were removed from the room while the remaining members of the jury were selected or not, and the question is were they, or weren't they?

Mr. Margiotti has shown you the paper which says that the jury was sworn as a whole when the fourteen were selected and that they thereafter went to the view. The question is does that refresh your recollection sufficiently so that you can now say were the eight, or any portion thereof, jurors taken from the box and put in another room while the remaining jurors were questioned on their voir dire ——

BY MR. MARGIOTTI: Not the eight

BY JUDGE MURPHY: Those already selected. Were those already selected, whatever number it was, removed from

the room while the remaining jurors were selected, or were they there throughout the entire voir dire of all the jurors?

BY THE WITNESS:

A. I can only answer it in this way: My recollection was during (905) sometime in the trial that some of the jurors then selected were removed. It may have been that I was confused by the fact that I so moved that it be done. Whether it was done or not, I simply am not clear about, Mr. Margiotti.

BY MR. MARGIOTTI:

Q. Thank you ——

BY JUDGE MURPHY: We will take our usual morning recess.

(Recess.)

(Court resumes after the recess with the parties, including the Relator, David Darcy, present in Court.)

HONORABLE EDWARD G. BIESTER, recalled.

CROSS-EXAMINATION (Continued).

BY MR. MARGIOTTI:

Q. Judge, were you a subscriber to the local papers?
A. Yes sir.
Q. Did you read the Doylestown paper "The Intelligencer"?
A. I read it, yes.

Q. And that paper comes out daily, doesn't it?

A. Yes.

Q. Did you read the editorials in that paper?

A. I suppose you are referring back to the time of these trials. I don't know whether I read a particular editorial or whether I didn't.

Q. Not only at the time of the trials but before the trials.

A. I read the paper. I never read it from cover to cover. I don't know whether I read any particular editorial or not.

Q. Did you read any other local papers? By "local" I mean Bucks County papers.

A. No.

(906) Q. Did you read any other newspapers carrying stories of the Feasterville killing?

A. Well, we have for years been receiving the Philadelphia papers, the Evening Bulletin and the Inquirer. I must have read them, yes.

Q. Did you listen to comments on the radio?

A. I think not.

Q. Did you see any television pictures of the defendants, particularly Darcy?

A. No.

Q. Now during the testimony produced in the case, without going over it specifically, in a general way, was very much alike in Foster-Zietz case as it was in the Darcy case?

A. Yes.

Q. And the testimony in the Foster-Zietz case was published either as a summation or in a question and answer form in the Doylestown paper?

A. I believe that is right, yes.

Q. And you knew that was going on?

A. Yes.

Q. And you say that the Foster-Zietz trial was fixed when—when did you first schedule it?

A. I don't remember the precise day.

Q. I think you said "after they were attached," you used the word "attached"?

A. No. I said that the Darcy case was fixed prior to the time the Foster-Zietz case was attached, in the sense not as the precise date but that it would follow.

Q. By "attached" you mean when the two cases were joined together, I assume?

A. When they actually came to trial.

(907) Q. When they actually came to trial?

A. Yes.

Q. You used the word "attached." What would be another word for it? What word would be synonymous to "attached"?

A. When it attached—was arranged and we were ready for trial.

Q. I see. And so that at the time Foster-Zietz were called for trial it was at that time that you fixed or scheduled the Darcy trial?

A. It was prior to that time, Mr. Margiotti.

Q. How long prior?

A. I can't be precise. I would say it was a matter of probably two or three weeks, but I am not sure.

Q. When did you fix the Foster-Zietz trial?

A. At the same time.

Q. At the same time. Now in fixing these cases for trial how would the defendants or their attorneys, or the public, know when these trials were coming up?

A. Our case papers. In each instance counsel for the defendants—it was in connection with the fixing of them we discussed it with counsel for the defendants. I don't know of the defendant himself in any instance knowing it. I don't recall advising them directly except talking with counsel. I don't know how the public would have known of it.

Q. Do you recall making public announcements of the trials?

A. No sir.

Q. And so far as the scheduling of the trials was concerned, it was strictly within your prerogative?

A. Yes, with some attention to other business of the Court. The Court would also, I take it, have to find that acceptable.

Q. Then you would fix the date with the provision of the Court?

A. That is right.

(908) Q. Assuming that the Court agreed to the date?

A. That is right.

Q. Isn't it a fact that you set the Foster-Zietz trial for the May Term?

A. Yes.

Q. And isn't it a fact that you announced to the newspapers that the Darcy trial would not be tried that term but the following term?

A. I believe not.

Q. Didn't you anticipate that because you were trying the two defendants together, you couldn't do any more than try that case that term?

A. No.

Q. Do your remember on May 14 reading the Doylestown paper in which it was substantially stated that the Foster-Zietz trials would be held during the May term and that the Darcy trial would be held at a later term?

A. No.

BY MR. MARGIOTTI: We are looking for May 14.

Q. Judge, I am going to call your attention to "Relator's Exhibit No. 51," particularly to an article "Four Murder And Four Manslaughter Trials Listed." It is an article dated under a front-page article, center of the page, in the Doylestown Daily Intelligencer of Friday Afternoon, May 14. Would you please read that?

A. I have read it, yes.

Q. Now, Judge, this article says:

"Four murder cases are listed on the docket for the May term of county criminal court that opens next Monday, (909) but only two will be tried during the approaching term.

"The two murder cases for trial are those of Harold Foster, 23, and Harry Zietz, 18, both of Philadelphia. They will be tried for their alleged part in the murder of William Kelly, 38, of Trevose, last December, when four youths held up a tap room and started shooting after a $425 robbery.

"Two others, David Darcy, and Felix Capone, will be tried later."

A. Yes, that is what the article says.

Q. Did you give that information to Mr. Thomas or anybody representing "The Intelligencer"?

A. No, I don't recall it.

Q. You don't recall. What is your best recollection on the subject—that you did or you didn't?

A. My best recollection is I didn't.

Q. Yes. And who was the contact man or the public relations man in your office who gave out the news in your office to the newspapers?

A. I don't know that anyone gave news out. We didn't—weren't contacted by a newspaper as a general proposition—no publicity man, certainly.

Q. Was there any rule laid down by you as District Attorney as to who in your office, whether it be yourself or an assistant, should give out publicity when publicity was to be given out?

A. No.

Q. Did you give out news yourself at times?

A. I don't know exactly in what connotation you mean that. I don't recall I have volunteered to the newspaper man and suggested (910) he publish certain things. If inquiry were made of me, I would furnish them with the information.

Q. That is particularly what I meant. If a newspaper man came to you and asked you questions, you would furnish the information?

A. In some instances, I have, yes.

Q. Yes sir. Now, do you know Mr. Thomas?

A. Oh yes.

Q. Do you know Mr. Trauch?

A. Oh yes.

Q. Did they cover the Darcy trial?

A. I don't recall, but I think quite likely.

Q. Do you remember seeing them in Court?

A. One or the other or both were there, yes.

Q. At that press table?

A. Yes, I believe so.

Q. Do you recall seeing them in Court during the Foster-Zietz trial?

A. Specifically as recalling their having been there, Mr. Margiotti, I don't, but it is a natural assumption that they were there.

Q. That is right. Now I am going to call to your attention "Relator's Exhibit No. 55," being the front page of the Doylestown Daily Intelligencer—pardon me! I will withdraw that question.

Did you see this article that is now called to your attention, "Relator's Exhibit No. 51," before you came to Court?

A. I don't recall.

Q. Do you remember seeing it during—about the time it appeared in the paper?

A. No, not that specific article I don't recall.

(911) Q. You don't recall. Do you recall whether you called the Doylestown Daily Intelligencer or had somebody call them to state that the paper was in error about the schedule of the cases?

A. I don't believe I did so or had anyone do so.

Q. I show you "Relator's Exhibit No. 55," being the front page of the Doylestown Daily Intelligencer of the date of Monday Afternoon, May 24, and I refer you particularly to the article on the right-hand column.——

A. Left-hand——

Q. —— left-hand—pardon me—left-hand column headed "Feasterville Murder Case Defendants Go On Trial." Would you please read that?

A. Yes, I have.

Q. Now May 24 was the day that Foster and Zietz trial began?

A. That is correct.

Q. And according to this article, there was a statement—that carries a statement on the front page:

"Only two of the defendants charged with the murder will go on trial this term.

"They are 18-year-old, red-headed Harry Zietz, of Oakland St., Phila., who is alleged to have fired the shot that fatally injured Kelly; and Harold Foster, 23, of Teasdale St., Phila.

"The other two defendants, David Darcy, 22, and Felix Capone, 16, will be tried at a later term of court?"

A. Yes, that is what the article says.

Q. That is what the article says. When would the next term have been?

A. The September Term of Court.

(912) Q. The September Term of Court. Your May Term runs then until September?

A. That is correct.

Q. And did you give out this information to the newspaper?

A. I think not.

Q. Did you see this story in the Doylestown Daily Intelligencer?

A. I don't recall whether I saw it or not. To answer you I must say that it is very likely I saw it, to be entirely fair, but I don't recall specifically seeing it.

Q. Do you recall whether or not you called to the attention of the newspaper or their reporters any inaccuracy in the story?

A. I don't recall having done so. I don't know whether—may I answer an additional not too indirect—I might suggest to you the terms of Court and that expression for those people known as lawyers and judges ——

Q. That is correct.

A. —— and terms of Court as we understand them in legal parlance may be different than the layman's understanding would be. They may think a term of Court is when a jury is summoned for the trial of a case.

Q. The newspaper man with many years' experience around Court generally knows what a term of Court is?

A. Well, I can't answer that.

Q. Well, this case of Foster-Zietz ended on Thursday—or Friday, rather, is that right?

A. I don't recall. If you say so, I will accept that.

Q. Don't you remember it was a Friday?

A. I heard the testimony and I am reasonably sure that is correct, but I haven't checked back in these records.

Q. Do you remember? If you do not recall it, I will get the exhibit, a copy of the Doylestown Daily Intelligencer of June 5, (913) which carried comments—alleged comments of Judge Boyer to the jury in connection with the Foster-Zietz trial.

A. You are asking me whether I remember that issue of the paper ——

Q. Yes.

A. No sir.

Q. Do you remember seeing that in the paper?

A. No, I do not.

Q. I show you now the issue of June 5 of the Doylestown Daily Intelligencer, "Relator's Exhibit No. 78," and call your particular attention to the article on the right-hand side

headed: "Judge Boyer Praises Jury For Verdict Condemning 2 Killers To Electric Chair." Please read that—and read to the end of the quotations by Judge Boyer. Then I will ask some questions. You don't need to read the whole article unless you want to.

A. Yes, I have read it.

Q. Have you seen that before?

A. I can only answer you this way, Mr. Margiotti: It is extremely likely I read this, but to ask me whether I read a particular article on June 5, 1948 in the Doylestown Daily Intelligencer, I cannot say yes specifically. I think it is fair to assume that I did read it at the time.

Q. I see. All right. Now then, Judge, was there any effort made by you, or the Judges of that County, to persuade the lawyers to try all these cases together, the four of them, in the interest of saving costs to the County?

A. I don't recall.

Q. Wasn't there some effort made to get through with the cases as fast as possible and once you got started, of course, complete the cases?

A. As to these specific cases——

Q. Yes.

(914) A. I should say no.

Q. Now if this case ended—do you remember, Judge, whether or not the week of June 7 the high school of that community had scheduled commencement exercises in that courthouse?

A. No, I don't, but again I will have to answer you that the high school usually had its exercises there. When it was probably fixed, I don't know, and it would be about that time of the year.

Q. Yes. I call your attention now to the issue of March 1 of the Doylestown Daily Intelligencer, and particularly to an article appearing near the center of the front page headed: "Charged With Murder, Asks Separate Trials."

A. Yes, I see it.

Q. Is your answer with reference to this article the same as it has been to the others?

A. That is correct, yes.

Q. Yes ——

BY JUDGE MURPHY: Exhibit No.. Mr. Margiotti ——

BY MR. MARGIOTTI: "Relator's Exhibit No. 43."

Q. "Petitions for severance, asking for separate trials in the cases of David Darcy, 22, and Felix Capone, 16, charged with murder, were filed this morning in court.

"They are two of four Philadelphia youths charged with the murder of William Kelly, 38, of Trevose, last December 24, outside the Feasterville Tavern, following a hold-up; . . ."

"Judges Hiram H. Keller and Calvin S. Boyer asked that the matter be heard in further detail this afternoon, in an effort to have a combination trial if possible, covering all defendants . . ."

Did that occur?

(915) A. I don't recall it.

Q. ". . . Counsel for Darcy and Capone, however, stood on their legal rights, and stated that they would ask for separate trials as provided by law in cases of murder.

"The Court commented, 'Separate trials in these cases will mean that it may take a year to dispose of the cases' . . ."

Did that occur?

A. I don't recall.

Q. Were you in Court when any remarks such as those were made?

A. I don't remember it, Mr. Margiotti—I really don't remember it.

Q. Now after the jury brought in its verdict in the Foster-Zietz case, were you in Court?

A. Yes.

Q. Were you there when the judge addressed the jury?

A. I believe so.

Q. When Judge Boyer addressed the jury?

A. Yes.

Q. Did you hear his remarks to the jury?

A. Yes.

Q. Did you take down the remarks that he made to the jury?

A. No, I did not.

Q. Do you know whether they were recorded by anyone?

A. I do not.

Q. This is after the verdict, of course?

A. Yes.

Q. Do you know whether it is customary in your County to record remarks of the Court after a jury returns a verdict?

A. It is not customary.

(916) Q. It is not customary. Then do you know whether or not the remarks attributed to him in "Relator's Exhibit No. 78" were made or not?

A. May I see it, please —

Q. Yes. They are in quotations.

A. My best recollection is that Judge Boyer said something very like that or that itself, Mr. Margiotti, at the conclusion of the trial. I know I do recall that he did commend the jury.

Q. Now, Judge, that was on Friday and this article on Saturday; Darcy was to be tried Monday morning and selection of the jury started on Monday morning. Was there any application made or suggestion by anyone for a continuance of his case at that time?

A. No, there was not.

Q. Did you make any suggestion or application as District Attorney for the continuance of the case?

A. I did not.

Q. And to a later date, of course.

Isn't it a fact, Judge, that the Darcy trial was really scheduled and definitely scheduled just before you went to the jury in the Foster-Zietz case?

A. You mean—the beginning of the closing of the Foster-Zietz case——

Q. Just before you started the closing addresses when the testimony was closed and just before you went to the jury to make speeches?

A. I think not.

Q. I want to call your attention to "Exhibit No. 93," also being the Doylestown Daily Intelligencer of June 11, 1948, and particularly the last note under "We Noticed" here.

A. Yes, I have seen this.

(917) Q. Had you seen that before?

A. As to before, I don't know; it isn't unlikely I saw it; I don't recall.

Q. This article reads:

"In a Philadelphia newspaper column, the following excerpt: 'So many murder trials are cluttering the Bucks county criminal docket that Doylestown High School graduates won't be able to hold their commencement exercises in the ancient court house. Instead they will be graduated outdoors.'"

Do you know that their exercises were scheduled for the week of June 7?

A. I don't recall, but I think it is very likely.

Q. And do you know that the exercises were held outdoors, or don't you?

A. I don't know.

Q. Now, Judge, did you have anything to do with the prosecution of Robert White of 8388 Bustleton Avenue, Philadelphia?

A. I have no idea.

Q. Except that the case was in your office?

A. I have no idea.

Q. I show you now "Relator's Exhibit No. 94," and I call your attention to an article headed: "Judge Boyer Warns That Bucks County Is Tired Of Thieves From Phila."

BY JUDGE MURPHY: What is the date?

BY MR. MARGIOTTI: The number is "No. 94", the date is June 12, 1948.

BY THE WITNESS:

A. Your inquiry is what, Mr. Margiotti?

(918) BY MR. MARGIOTTI:

Q. Calling that article to your attention and I want to know whether that article refreshes your memory in any way.

A. To the extent as to whether I personally prosecuted

Q. Whether or not you know about that case being in your office.

A. No, it does not refresh my memory.

Q. Were you present when any of the events stated in that exhibit occurred, or are alleged to have occurred?

A. You mean when the remarks of Judge Boyer were made ——

Q. Yes.

A. I think not. My recollection—and I must say this is because I refreshed my recollection from something was said to me—is that now Judge Satterthwaite was asked to handle several cases on behalf of the Commonwealth, and that was one those that he did ——

Q. According to this article, it was Judge Boyer?

A. Judge Satterwaite was then not a Judge.

Q. I see. I beg your pardon! He was acting as an Assistant District Attorney?

A. Yes. That is what I am advised, sir. I say I have no independent recollection.

Q. At the end of the testimony in the Foster-Zietz case and before the defense counsel went to the jury, do you remember whether Judge Boyer made some statement that "Now we will be able to try the Darcy case next week?"

A. No, I don't recall.

Q. Is your charge—I am finding out by going by, but maybe we can save time by my asking: Was your address to the jury made a part of the record?

(919) A. In this case, no, it was not.

Q. You say that Judge Boyer—it was the custom during the trial of the case to join Judge Keller, is that right?

A. It was the custom to join him on the bench at the inception of the affairs of that day, yes.

Q. And when Court convened in the morning with the two Judges on the bench, where was the jury in the Darcy case?

A. I don't remember, Mr. Margiotti.

Q. Were they in their places?

A. You want to know were they in their places, or whether they weren't—as to what the practice was, I simply have no recollection.

Q. You don't remember whether they were in their seats or whether they had not been brought to their seats yet?

A. I don't recall.

Q. Now you have stated that on several occasions, at least, that the purpose of that was to handle miscellaneous business?

A. That would be his reason for first joining him, yes.

Q. First sitting on the bench?

A. Yes.

Q. Do you recall of any particular business—of any single business that was handled during the Darcy trial by the two Judges——

A. No, I do not.

Q. —— which would come within the classification of miscellaneous business?

A. I do not.

Q. Now you have stated too that he usually withdrew when the trial of the case was in progress?

A. Yes.

Q. The trial of which case was in progress?

(920) A. The trial of the murder case.

Q. The Darcy murder case?

A. The Darcy case, yes.

Q. Was that in the presence of the jury?

A. Yes.

Q. And was the jury in a position where they could see the Judge on the bench and withdrawing?

A. Yes.

Q. Will you tell me on these several occasions that you say he withdrew, the Judge, how long he remained on the bench after the miscellaneous business had been transacted?

A. No, I can't tell you. It would vary. I think there were some days when Judge Boyer sat there for probably an hour at a time, but I think his stay there was usually brief.

Q. And during the time that he was on the bench was evidence being presented in the Darcy case by the Commonwealth?

A. At times, yes.

Q. And will you state during those times while evidence was being presented whether there were any objections to the admission of testimony?

A. I have no independent recollection except that I think there was an objection in connection with this colloquy at sidebar. I haven't examined the record back to determine what brought it about, but my assumption is there was some objection to some offer of the Commonwealth.

Q. Weren't there other objections before that?

A. I don't know.

Q. Didn't Judge Boyer on occasions confer in a low tone so that other people couldn't hear with Judge Keller?

A. Oh yes.

BY JUDGE MURPHY: (921) You mean that he conferred on rulings in the Darcy case?

BY THE WITNESS: I don't know what he conferred about. I didn't hear what they were talking about. I know they sat together and they would occasionally talk to each other. I don't remember except in connection with this particular situation that has been marked at sidebar. I think there was a question of evidence involved.

BY MR. MARGIOTTI:

Q. The reason you remember that particularly is because there is a record of it?

A. That is it exactly.

Q. There is no record of any other conferences between the Judges?

A. No, there is no record.

Q. Where did Judge Keller sit?

A. Well, there was then but two chairs. He sat on the one to the left, the one nearer to the jury.

Q. How close were they?

A. The two chairs —

Q. Yes.

A. I should estimate approximately four feet apart, something like that.

Q. Approximately four feet apart. Oh, by the way, as to Judge Keller, did he at that time unfortunately have some infirmities?

A. Judge Keller, since a very young man as a result of an accident, has been blind in one eye.

Q. He is blind in one eye?

A. Yes.

Q. Which eye, do you know, Judge?

(922) A. I don't know.

Q. Isn't it his right eye?

A. It may be; I don't know.

Q. Is his hearing good?

A. His hearing in recent years is not as keen as it was when he was younger.

Q. How was his hearing at the time of the Darcy trial?

A. You mean was he at that time deaf or had impaired hearing ——

Q. I didn't say he was deaf ——

A. I don't know how to answer your questions as to his hearing. I think it was reasonably good.

Q. Reasonably good?

A. Yes.

Q. And at that time did he have this blindness in one eye?

A. Certainly, he has had that, as I say, since he has been a young man.

Q. Now on the occasion of this sidebar conference which appears on Page 800—which begins on Page 830—while it begins on Page 829, you begin your discussion on Page 830 maybe we better give him a copy of this ——

BY MR. VAN ARTSDALEN: This is a copy of the original record.

BY THE WITNESS:

A. I have Page 830 before me.

BY MR. MARGIOTTI:

Q. Page 830:

"(Discussion at side-bar.)

First comes the statement by you covering practically the entire page; then comes a statement by Mr. Achey in which Mr. Achey—you offered to prove "CX-71"—what was "CX 71," do you remember off-hand, Judge?

A. Oh no; certainly not.

(923) Q. Is there anything that follows after the Court overruled the objection that would refresh your memory? It has been suggested by Judge Pannell that Page 841 might help you—yes, it does.

A. Referring to the record, it was evidently a joint statement of the defendants Zietz, Darcy, Capone, and Foster.

Q. Now you offered to prove that statement; then you gave your purposes; is that right?

A. Yes.

Q. And that involved the question of evidence in the commission of other crimes?

A. Yes.

Q. And Mr. Achey objected to that?

A. Yes.

Q. And Judge Boyer said in reply to him: "That applies only to cross-examination?"

A. That is what the record states, yes.

Q. And it was at that time that Mr. Achey said: "I object to Judge Boyer sitting in on this case. I don't mind trying against one Judge ——?"

A. Yes.

Q. Did he use that word—"... trying against one Judge?"

A. I don't recall the precise language. I have no reason to quarrel with the recorder's notes on it.

Q. And then Judge Boyer said: "The Judges reserve the right to confer without being obliged to get the consent of defense counsel"; then the objection of Mr. Achey was finally overruled by the Court, and it says: "The Court: The objection is overruled." Who was speaking for the Court, do you know?

A. Only by practice that when it says "The Court" throughout the (924) notes of testimony it refers to the Trial Judge who would be Judge Keller.

Q. All right; do you know how long Judge Boyer had been on the bench when this particular incident happened?

A. No recollection whatever, Mr. Margiotti.

Q. Do you know whether it was five minutes or one hour?

BY MR. VAN ARTSDALEN: I object.

BY THE WITNESS:

A. I don't know.

BY MR. VAN ARTSDALEN: The witness has already answered.

BY THE WITNESS: I do not know.

BY JUDGE MURPHY: The witness has already answered; he answered again.

BY MR. MARGIOTTI:

Q. You don't know. Do you know whether he remained on the bench for an hour after that?

A. I do not.

Q. Well, that part of the—that event occurred toward the end of the testimony, didn't it—the taking of the testimony?

A. It is subject to arithmetical computation; I don't know. I take it this is all the fifth day of the trial that I have before me. It is marked "Fifth Day."

Q. I state I don't know.

BY JUDGE MURPHY: I state for the benefit of both of you there are three volumes.

BY MR. MARGIOTTI: (925) If the Court please, this record shows—this is only for the convenience of the record—the occurrence takes place on 831 and the end of the testimony is 863 at 1:30 P. M.; then starts the Charge of the Court.

Q. Now you have stated, Judge Biester, that there were times when the Judge was not otherwise engaged in the business of the Court—meaning Judge Boyer—on several occasions sat on a chair near the Judges chambers, and that chair you indicated on the "Relator's Exhibit No. 135" as being the chair marked "Judge Boyer"?

A. That one or one immediately near to it.

Q. That is right. Now when you say it happened on several occasions, what is your—what do you mean by "several"?

A. I am afraid as I used it there it is a general term without preciseness. As to whether it was three—four—five—or how many times, I can't fix the number of times. I would say that when I say "several," it was three or more.

Q. Three or more. And in that position, Judge, was he within the full view of the jury?

A. Yes.

Q. Judge, in the affidavit, which the Commonwealth sought to file in this case, in Paragraph 9 you said:

"That, to the best of the recollection of this affiant, at no time during the course of the trial did Judge Boyer assist, attempt to assist, make suggestions to, or otherwise aid the

Commonwealth in the trial of the case, nor pass any messages to this affiant in connection with the trial of the case for the use of this affiant or Judge Keller."

You still stand by that, don't you?

A. Yes.

(926) Q. And that is what you meant by your testimony when you were examined in Chief?

A. Yes.

Q. Judge, do you recall that toward the end of the charge Judge Keller said: "Have I overlooked anything? Are there any corrections to be made?"

A. It is fair to assume he said it. I think he says it in almost every trial, and it is in the notes of testimony.

Q. And as a general proposition upon making that statement he would look at counsel on both sides and wait for their answers if they—if they had any answers to make before proceeding further ——

BY MR. VAN ARTSDALEN: I don't believe there is any question there. It is a statement.

BY MR. MARGIOTTI:

Q. Didn't he then after making that statement pause and wait for an answer?

A. I presume he did.

Q. And isn't it true that Mr. Achey did make an answer?

A. According to the notes as I heard them read yesterday, yes.

Q. Yes. It says—we will give you a copy of this so that you can follow as we go along. Mr. Achey said: "Nothing for the defendant, Your Honor?"

A. Yes.

Q. At that time you said nothing?

A. Apparently that is true.

Q. What was that?

A. Apparently that is true. I don't recall saying anything. Nothing appears on the record.

(927) Q. You had an opportunity to talk right then and there if you wanted to, didn't you?

A. Yes.

Q. Then the Court went on with what appears to be the conclusion of his charge. Do you observe that?

A. Yes.

Q. And then there appears to be a statement by you?

A. Yes.

Q. When you made that statement where were you?

A. I believe I rose in courtesy to the Court and came to in front of the bar of the Court.

Q. In front of the desk?

A. Yes, in front of the desk.

Q. And when did you make your mind up to go before the bench to make that statement?

A. I don't know.

Q. Was it while the Judge continued to close his charge or was it at the close of his charge?

A. That would be purely a matter of rationalization in memory; I don't know.

Q. You don't know. Why would you present this argument to the Court when he asked in the first place, "Have I overlooked anything? Are there any corrections to be made?"

A. I cannot delve into my memory on that; I don't know.

Q. Then the Court made a reply to you; this is on top of Page 906, two paragraphs, and then you answered—your last words were:

"I am sorry, but I don't think that would be beyond a reasonable doubt, that it would be on the preponderance of the evidence that it was during the commission of a robbery. I

think Your Honor inadvertently said that they (928) would have to believe that beyond a reasonable doubt ——"

A. Yes.

Q. "... that it was not."

And the Court said: "If I did, that will be withdrawn." Now when did you make up your mind to make that statement?

A. I presume immediately after Judge Keller made his statement which I was not in accord with.

Q. I see. Hadn't the Judge covered the reasonable doubt in his charge?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it.

BY THE WITNESS:

A. Yes, he had.

BY MR. MARGIOTTI:

Q. And what was there to cover by the preponderance of the evidence?

BY JUDGE MURPHY: If you can recall.

BY MR. MARGIOTTI:

Q. If you can recall.

A. I don't recall, Mr. Margiotti.

BY MR. MARGIOTTI: Judge, thank you and that is all.

(Witness excused.)

BY JUDGE MURPHY: Now, does the Commonwealth rest?

BY MR. RYDER: The Commonwealth rests.

(929) BY MR. LAWLEY: We have here a subpoena that was issued to Joseph C. Nissley by counsel for the Relator. Joseph C. Nissley is Secretary of the Board of Pardons, which is a Board within the Department of Justice of the State. We move to quash the subpoena on the ground that the records which have been subpoenaed are not public record; and second, for the reason that the records are for the convenience of the individual board members. We do not believe they should be taken away from the Board and introduced into evidence here in this Court. However, if the counsel for the defendant wishes to see what is in them—Mr. Margiotti, they are welcome to do so, but we do not wish to have them introduced and lost to us in the Department at Harrisburg.

BY MR. MARGIOTTI: We are going to see that they are not lost.

BY JUDGE MURPHY: Has Mr. Margiotti had access to this?

BY MR. LAWLEY: To this point, no sir.

BY JUDGE MURPHY: Do you or don't you object to him having a look at them?

BY MR. LAWLEY: No sir, we have no objection to Mr. Margiotti looking at them.

BY MR. MARGIOTTI: I can't very well proceed without

looking at them and it won't take me long to look at them, and it won't be long after I look at them ——

BY JUDGE MURPHY: All right, it is now 12:35. We will recess then until (930) 2:00 o'clock.

(Recess.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

ATTORNEY WILLARD S. CURTIN, recalled.

RE-CROSS EXAMINATION (Continued).

BY MR. MARGIOTTI:

Q. Mr. Curtin, when you appeared before the Pardon Board during the session of March 20 and 21, 1951 — that is the Pardon Board of Pennsylvania, did you appear in opposition to an application for commutation for David Darcy?

A. Well now, Mr. Margiotti, I appeared before the Pardon Board, as I recall, at least three times; once was the original hearing, once was when you were a member of the Pardon Board, and once was when you appeared for Mr. Darcy. Now, the date — I don't know which of the three occasions you are speaking about when you say "March 1951." Which of the three was that?

Q. When you appeared was I a member of the Pardon Board?

A. On one of the occasions, sir, you disqualified yourself from active participation in it, but you did sit with the Board who chastized me for a petition I filed.

Q. When you appeared and when I remained on the Board what happened?

A. Then the Board took a continuance to the next year.

Q. The case was continued from time to time?

A. That is true.

Q. You made some requests?

A. That is right.

Q. Then there was some continuance due to the fact we didn't have sufficient members of the Board?

A. That is right. I believe that is correct.

(931) Q. Finally the case came up for argument on March 20 and 21 when I was out of the Attorney General's office?

A. I presume that is the rehearing you are speaking of. I recall that occasion. Now, what is your question?

Q. On that occasion did you not say:

"Now as to Darcy following the trial of Zietz and Foster, we will admit that the trial was a matter of about two or three weeks later. However, gentlemen, there was an entirely new panel drawn for the second jury, of course, and all those jurors were examined on their voir dire under oath and all of them testified they had no knowledge of the preceding cases and we assumed they were telling the truth when they said they had no opinion as the result of that previous trial, so I feel that was not a bad error in disposing of these cases in the manner that was done?"

A. I have no recollection of saying that. If the record says I did, I guess that would stand. But could I see the record? Would I be permitted ——

Q. Didn't I ask you substantially that question ——

BY JUDGE MURPHY: What about the request of the witness?

BY MR. MARGIOTTI: I will show it to him.

Q. Didn't I ask you substantially that question when you were on the stand before?

A. I believe you did, and I said I had no recollection of making that statement.

Q. Didn't you say you didn't make it?

A. I don't think so.

BY MR. VAN ARTSDALEN: (932) I object.

BY JUDGE MURPHY: The objection is overruled.

BY MR. MARGIOTTI:

Q. If you want to look at this record I am willing to show it to you. It is the record of the Pardon Board. That is Page 19, top of the page.

A. I have seen it.

Q. You have seen it?

A. Yes sir.

Q. And if this record is accurate, that is what you said?

A. Yes sir. Can I explain it?

Q. You either said it or didn't ——

BY JUDGE MURPHY: Do you object to him explaining?

BY MR. MARGIOTTI: I don't think it matters.

BY JUDGE MURPHY: The Court will be happy to hear an explanation if the witness has one.

BY MR. MARGIOTTI:

Q. Do you desire to explain?

A. Yes sir. It is quite obvious to me, sir, from my very hasty perusal of that section of the report that I in explaining

when the trial happened—perhaps was not clear in my enunciation and that the Reporter mistook the word "days" for "weeks," or it could have been I used the wrong word. I notice there was no questioning that expression by you immediately following my statement which would immediately indicate to me there was no question in your mind—there was no question in your mind what was meant.

(933) Q. Do you recall at the end of the argument that matter was discussed and you were to look up the records of what was the time between the Foster-Zietz trial and the Darcy trial?

A. In this case during my years as District Attorney I appeared on a number of occasions before the Pardon Board, before State tribunals and Federal tribunals. I have no recollection, sir, of what I said at any particular time in any particular one of those hearings.

Q. Now there is nothing in this statement that says there was a mistake made about you saying "weeks" in place of "days"?

A. I didn't know it was in that report until you just showed it to me. Therefore, I wouldn't know whether it was a mistake of fact in the transposition of "weeks" instead of "days."

Q. But look at Page 19. There is nothing in here that would indicate there was any mistake about "two or three weeks later" meaning "days"?

A. Obviously, sir, there was no doubt as to when the trial was held as to another trial, so that, obviously, I made a mistake in using the word "weeks" instead of "days," or else I didn't enunciate clearly and the Stenographer mistook my word "days" for "weeks."

Q. You think you made a mistake?

A. Obviously, I must have because there was a trial and there is a record when the case started and "Now as to Darcy following the trial of Zietz and Foster, we will admit that the trial was a matter of about two or three weeks later . . ."

BY JUDGE MURPHY: Didn't the Darcy trial start two or three weeks after the Foster-Zietz trial started? We think it did, according to the records. The word "start" is not in there and the word "end" is not in there.

(934) BY MR. MARGIOTTI: The matter before the Board was it was immediately afterwards the other trial was started.

BY JUDGE MURPHY: It was started two weeks after the other was started but actually only four days after it ended—three days and a fraction. Either Thursday or Friday until Monday. When did the trial end—Zietz-Foster?

BY MR. VAN ARTSDALEN: Friday.

BY JUDGE MURPHY: Friday until Monday.

BY MR. MARGIOTTI:

Q. Now, do you—is your explanation confined to what you said here or what you did as just enumerated?

A. Mr. Margiotti, as I have just explained to you, I don't recall what I said at these various hearings. There were a number of hearings over the five years that I was appearing before various tribunals in reference to this matter and at times in allied matters. I can't recall what I said before each tribunal.

Q. You did testify, however, that ". . . all those jurors were examined on their voir dire under oath ——

BY MR. VAN ARTSDALEN: I object.

(935) BY MR. MARGIOTTI: "—and all of them testified they had no knowledge of the preceding cases?"

BY THE WITNESS:

A. I did not testify, sir.

BY MR. MARGIOTTI:

Q. You said it—let me say you said it.

BY JUDGE MURPHY: This Court has been before the Board of Pardons at least one hundred times in our day. We know you are not under oath. As a lawyer you are making a statement, as we made many, many statements.

BY MR. MARGIOTTI:

Q. You said that?

A. I said apparently what the record indicates that I said, yes sir.

Q. You were talking there about the panel?

A. Talking about what, sir? Yes, it would appear I was talking about the panel at that time. We usually speak about examining the members on their voir dire.

Q. Now, isn't it correct that one of the jurors did testify that he was present in Court during some of the days of the preceding trial?

BY MR. VAN ARTSDALEN: I object, a matter of record; it will appear of record.

BY JUDGE MURPHY: Will you kindly refer to the page in the record?

BY MR. MARGIOTTI: Page 218. Particularly on Page 220. The juror's name is William H. Slaughter.

(936) BY JUDGE MURPHY: Page 220 you say?

BY MR. MARGIOTTI: Yes sir.

Q. You understand the question?

A. I understand the question, sir. I am not familiar with what the record says in that respect. I have not seen the record in a couple of years. If it says that in the record, I presume that is what that particular juror said on his voir dire.

Q. If one juror did so testify, then your statement that you made that ". . . they had no knowledge of the previous cases ——

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We understand that when the gentleman was before the Pardon Board he, in all probability, was telling the Board that none of the jurors who served on the case had this particular knowledge, whereas the juror which you referred to on Page 220 was excused and did not serve.

BY MR. MARGIOTTI: I know that.

When he was talking to the Board he was talking about the new panel that was drawn ——

BY JUDGE MURPHY: Will you read his exact words for the record so that we can ——

BY MR. MARGIOTTI: The witness himself has said he was talking about the panel.

BY JUDGE MURPHY: What were his exact words?

(937) ". . . We will admit that the trial was a matter of about two or three weeks later. However, gentlemen, there

was an entirely new panel drawn for the second jury, of course, and all those jurors were examined on their voir dire under oath and all of them testified they had no knowledge of the preceding cases . . ." ——

BY JUDGE MURPHY: You go ahead.

BY MR. MARGIOTTI: ". . . and we assumed they were telling the truth when they said they had no opinion as the result of that previous trial . . ."

Q. Now, don't you know—I have called your attention to one juror, Mr. William H. Slaughter. Do you remember Anna W. Bucher?

A. I have no recollection of any individual jurors, no sir.

Q. Was she on the jury in the Darcy case?

A. I say, sir, I don't remember who the jurors were that were chosen to try David Darcy.

Q. Did you know at that time that Mrs. Bucher, whose testimony appears on Page 63, said that she had read recently—said "Well, I read something about it and heard something about it," and she was selected as a juror?

A. If the record indicates she was one of the jurors, then I assume that is correct, sir. If the record indicates that she said something like that, that too apparently would follow. I can only say in that connection that Mr. Achey was a very capable attorney; if he felt she was qualified to serve he must have had some knowledge that was not detrimental to your client.

(938) Q. I am asking you what you said before the Board and what the facts were ——

A. Will you tell me what the question is you want answered ——

Q. You are talking about Mr. Achey. I am talking about yourself and what the facts actually were as is compared to what you said to the Board.

A. You mean in reference to saying before the jury had no knowledge of the case that was tried before Darcy ——

Q. That is right.

A. That is right. The jury that Darcy was tried by had no knowledge of the facts which were, at least, detrimental to Darcy.

Q. And did you know at that time that another juror had testified he had heard the case discussed, and you told the Board ". . . they had no knowledge of the preceding cases?"

A. I don't recall, sir; what I said on any of those occasions. If the record says I said that, I must have said that. I agree to that.

BY MR. MARGIOTTI: I call the Court's attention to Mr. Harold Lake, Page 130 ——

BY JUDGE MURPHY: Let me call your attention to the fact if there is a contradiction or variance, it does not make it substantive evidence for the purpose of these proceedings, which will attack credibility.

BY MR. MARGIOTTI: May I call Your Honor's attention to the fact that certain (939) jurors who were examined on their voir dire—without taking the time we are doing now—certain jurors who were examined on their voir dire testified they had knowledge of the Zietz-Foster trial, and they were: Anna W. Bucher, Page 60; William H. Slaughter, Page 218, 219, 220; Harold Lake, Page 130; Clarence G. Angeny, Page 130; William H. Slaughter, Page 218 ——

BY JUDGE MURPHY: There is only one on Page 130. You have given two.

BY MR. MARGIOTTI: Page 130, only one, Harold Lake;

Clarence G. Angeny, Page 192; William H. Slaughter, Page 218; Charles L. Miller, Page 14; and Anna W. Bucher, Page 63—that is the same one ——

BY JUDGE MURPHY: We have had that before.

BY MR. MARGIOTTI: That is the same as No. 1.

BY JUDGE MURPHY: Yes sir. You have named five so far.

BY MR. MARGIOTTI: Frank Sigley, Page 115; George B. Paxson, Page 89; William Pardoe, Page 48; Marvin D. Weidner, Page 68.

Q. Now you also added in what you stated to the Board that "... these jurors "said they had no opinion as the result of the previous trial?"

A. If the record says I said that, I probably did. I would say now that they very likely had no opinion of Mr. Achey wouldn't have left them serve.

BY JUDGE MURPHY: For the record the better practice is did you say thus (940) and so? instead of having counsel interpret the words for the Appellate Court.

BY MR. MARGIOTTI: I shall read the whole thing.

Q. Did you say: "... However, gentlemen, there was an entirely new panel drawn for the second jury, of course, and all those jurors were examined on their voir dire under oath and all of them testified they had no knowledge of the preceding cases and we assumed they were telling the truth when they said they had no opinion as the result of that previous trial, so

I feel that was not a bad error in disposing of these cases in succession in the manner that was done?"

Page 19:

Now for the record, since the minutes are in evidence, may we call Your Honor's attention only for convenience for the future that there were a number of jurors who were not even asked whether they had formed an opinion as to the guilt or innocence of the defendant, and that they were twelve in number being: Mabel Senderling, Page 3; Harry W. Wambold, Page 13; J. Harper Atkinson, Page 14; Miriam W. Flory, Page 31; Frank Repetski, Page 35; John G. Ferguson, Page 41; Emma Shaddinger, Page 46; Marguerite Bergstresser, Page 51; Emily O. Higgenbottom, Page 71; John Barber, Page 78; Joseph E. Lownes, Page 82; Wesley H. Talley, Page 105.

And jurors who testified they had a fixed opinion in the Darcy case were fifteen in number, and they were: Charles L. Miller, Page 18; Jacob Shivo, Page 59; Anna W. Bucher, partially so, Page 63; Francis M. Phillips, Page 82; Harold Lake, Page 130; Harry Westlake, Page 96; Ernest F. Hamm, Page 122; Maude C. Buckman, Page 141; James G. Jackson, Page (941) 150; Albin Albrecht, Page 155; Robert W. Hall, Page 190; Elizabeth G. Elville, Page 226; Eva F. Kinsey, Page 234; Edmund C. Anderson, Page 237; Robert H. Clarendon, Page 250.

And then there were twenty jurors who were not asked whether or not they had any knowledge of the cases, and they are found on Pages—does the Court want me to give the names?

BY JUDGE MURPHY: Well, the better practice would be to give the number of the juror.

The Court has read the voir dire and we have the number that were challenged for cause by the Commonwealth, the number that were peremptorily challenged by the defendant,

the number that were peremptorily challenged by the Commonwealth, the number that were excused by the Court, and the number that were selected. We have read it; we have all of that.

BY MR. MARGIOTTI: All right then, we will give the numbers.

No. 1, No. 3, No. 4, No. 11, No. 13, No. 15, No. 18, No. 24, No. 32, No. 42, No. 44, No. 47, No. 57, No. 59, No. 64, No. 68, No. 71, No. 73, No. 80, and No. 61. That covers everything.

BY JUDGE MURPHY: All right, the Court has a duty to read the whole transcript from the beginning to end and make findings. But this is some help and we appreciate it.

BY MR. MARGIOTTI: I think it would be of some help. We made a summary too, just what Your Honor made, and we intend to include them in a brief.

BY JUDGE MURPHY: We appreciate the help, sir.

BY MR. MARGIOTTI:

(942) Q. Now, Mr. Curtin, do you know which eye Judge Keller has unfortunately lost the sight of?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will permit it. If Judge Keller has an eye that is causing some trouble and adds light, we will take it. Answer the question if you know.

BY THE WITNESS:

A. I am sorry, sir, I do not know which of Judge Keller's two eyes is the false one.

BY MR. MARGIOTTI:

Q. Isn't it generally known that it is the right one?
A. I don't know.

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. You don't know?
A. I would say that it isn't generally known that it is the right eye, sir.

BY JUDGE MURPHY: We sustained the objection. We will let the answer stand.

BY MR. MARGIOTTI: That is all.

RE-DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Curtin, do you recall whether the statements that you made (943) before the Board of Pardens were challenged by Mr. Margiotti?

A. Again, sir, that was one of many hearings, and I don't recall just exactly what was said by either party at the hearing or the others. I know a number of things were said at a number of hearings, but I can't recall what was said in anyone of them or what in rebuttal was said in anyone of them.

Q. I want to refer you to Page 19 of the transcript where Mr. Margiotti makes a statement, and ask you if you have any recollection of that statement being made?

A. I read the statement and I assume since it is a part of the record that it is probably true, but I don't have any independent recollection of it.

BY JUDGE MURPHY: Just for the record and for the benefit of counsel—we may save you a little work and at least it will have you check on the work of the Court—according to the records, as we see it, there were 21 challenges for cause by the Commonwealth; there were seven pre-emptory challenges by the defense—let me start again—there were 21 challenges for cause by the Commonwealth; there were 7 challenges for cause by the defendant; there were 7 pre-emptory challenges by the Commonwealth; there were 16 pre-emptory challenges by the defense; there were 19 excused by the Court; there were 14 served on the jury; and the figures total 79 if you add those up. Then there was one juror who got sick or something who was excused, and it may be confusing because the total was 78 starting out.

All right, now go on with your examination.

BY MR. VAN ARTSDALEN:

Q. Mr. Curtin, do you recall Mr. Margiotti stating at that time: "They immediately put Darcy on trial right after the conviction (944) of these two men with a verdict of murder in the first degree with the death penalty. They put on the third person Darcy?"

A. I have no independent recollection of that statement by Mr. Margiotti.

Q. Do you have any recollection of Mr. Margiotti stating at that hearing: "My impression is that he did not ask for a

continuance, but I want to say to this Board as I have observed Mr. Curtin here before how fair he is, I am surprised he himself of his own motion didn't ask the Court to continue the case to a following term . . ."? Do you have any recollection of that?

A. Again, sir, I have no independent recollection of it, but if the record says that is what was said at the hearing, I assume that is correct.

Q. And did you challenge in any way the statements made by Mr. Margiotti as to when the case started?

A. Again, sir, I have no independent recollection of what I said following what Mr. Margiotti apparently said, but I would assume whatever the record indicates is correct.

BY MR. VAN ARTSDALEN: That is all.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

BY MR. MARGIOTTI: By agreement of the parties in order that the transcript from the Pardon Board from which we have been examining Mr. Curtin may be returned to the Board, we have agreed that the question I propounded to Mr. Curtin may be introduced into evidence.

BY JUDGE MURPHY: Let me follow you—the question you propounded to Mr. Curtin (945) may be introduced into evidence ——

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: It is already there.

BY MR. MARGIOTTI: The exact question, the testimony as ——

BY JUDGE MURPHY: There was no question by you to Mr. Curtin—was there—before the Pardon Board?

BY MR. MARGIOTTI: No, the question in ——

BY JUDGE MURPHY: What you mean is what you read.

BY MR. MARGIOTTI: What I read here.

BY JUDGE WATSON: From that record.

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: Now I understand you.

We understand you are stipulating that the portion of the Pardon Board record which contains the context and the exact words which you included in your question to Mr. Curtin when you asked did you not say thus and so before the Pardon Board? be spelled out in this record.

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: And so far as that portion itself is concerned, we will receive it, but only that portion so far. If counsel can agree (946) what the context or particular words are: yes, but we are not going ——

BY MR. MARGIOTTI: Page 19:

"Now as to Darcy following the trial of Zietz and Foster, we will admit that the trial was a matter of about two or three weeks later. However, gentlemen, there was an entirely new panel drawn for the second jury, of course, and all those jurors were examined on their voir dire under oath ——

BY JUDGE MURPHY: Are you agreeing that all of Mr.

Curtin's remarks before the Board be spelled out in the record, the context as to what Mr. Curtin said, since he is the witness being challenged Mr. Curtin's remarks before the Pardon Board on these occasions?

BY MR. MARGIOTTI: I am only reading what I asked for the purpose of contradiction.

BY JUDGE MURPHY: Haven't you read that on the record twice before?

BY MR. MARGIOTTI: Yes, I have to introduce evidence to contradict him.

BY JUDGE MURPHY: Go ahead.

BY MR. MARGIOTTI: "Now as to Darcy following the trial of Zietz and Foster, we will admit that the trial was a matter of about two or three weeks later. However, gentlemen, there was an entirely new panel drawn for the second jury, of course, and all those jurors were examined (947) on their voir dire under oath and all of them testified they had no knowledge of the preceding cases and we assumed they were telling the truth when they said they had no opinion as the result of that previous trial, so I feel that was not a bad error in disposing of these cases in succession in the manner that was done."

BY JUDGE MURPHY: I assume you are offering it for two purposes: One certainly to attack the credibility of Mr. Curtin ——

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: I suppose the second purpose is

you are trying to show by that that Mr. Curtin was so biased and prejudiced—or is it?

BY MR. MARGIOTTI: That is part of it.

BY JUDGE MURPHY: —— Mr. Curtin was so biased and prejudiced he made misstatements to the Pardon Board.

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: Any other reason?

BY MR. MARGIOTTI: No.

BY JUDGE MURPHY: All right, it will be received.
Now, does the Commonwealth desire to offer any portion of it, or not?

(948) BY MR. VAN ARTSDALEN: If the Court will indulge us——

BY JUDGE MURPHY: Do you—or not?
We are only asking you so that we can complete this point and Mr. Margiotti ——

BY MR. VAN ARTSDALEN: Our agreement with him was we would agree that the record as to what he read states what he read if in turn he would agree what we read from the record is in the record.

BY MR. MARGIOTTI: That is true—if it is material.

BY JUDGE MURPHY: Will you mark out the portion of the record from which you read, that is the Commonwealth read; just a little indication somewhere on Page 10?

BY MR. MARGIOTTI: Whether it is material or not, I will have no objection. Let it go into the record.

BY JUDGE MURPHY: You are attacking the man for being biased and prejudiced, and there is a statement by you he was a very fair person and we think that ought to go into context.

BY MR. MARGIOTTI: I am willing it goes in the record.

BY JUDGE MURPHY: It is going in whether you are or not.

BY MR. MARGIOTTI: I am not making any objection.

BY MR. VAN ARTSDALEN: "They immediately put Darcy on trial right after the (949) conviction of thes two men with a verdict of murder in the first degree with the death penalty. They put on the third person Darcy."

That was the first statement referred to——

BY MR. MARGIOTTI: I object to his reading just that part of the sentence. I think he ought to read it all.

BY JUDGE MURPHY: That is what the Court suggested before about context. Now then, counsel has read, as we recall it, from Page 10 commencing with the last word on the second line:

"They immediately put Darcy on trial right after the conviction of these two men with a verdict of murder in the first degree. They put on the third person Darcy." Now then, Mr. Margiotti wants you to add:

". . . That man should have never been put on trial then. The attorney representing him didn't ask for a continuance. Is that right, Mr. Curtin?

"Mr. Curtin: I am trying to find it. Is that the part you want in?

BY MR. MARGIOTTI: Yes sir.

BY MR. LAWLEY: Again:

"Mr. Margiotti: My impression is he did not ask for a continuance, but I want to say to this Board as I have observed Mr. Curtin here before how fair he is. I am surprised he himself of his own motion didn't ask the Court to continue the case to a following term in order (950) to obtain a jury which had not heard the testimony whose minds had not been inflamed by a jury who just rendered an opinion."

BY JUDGE MURPHY: You offer that?

BY MR. LAWLEY: Yes sir.

BY JUDGE MURPHY: Do you object?

BY MR. MARGIOTTI: No.

BY JUDGE MURPHY: Then they will both be received; all right.

BY MR. MARGIOTTI: "Exhibit No. 116," being that envelope with certain papers, we offered the envelope, and I am quite certain in my own mind that I offered its contents too. If I did not, I wish at this time to offer the contents of "Relator's Exhibit No. 116." I am only making the offer at this time as a precaution.

BY JUDGE MURPHY: It will certainly be received because we have gone into them and discussed them, and they

were read then and examined. "Exhibit No. 116" including the contents are received in evidence. We think they were received before, but we reiterate.

BY MR. MARGIOTTI: My opinion, Your Honor, is sometime during the trial you asked me to spell out some page ——

BY JUDGE MURPHY: I directed the Stenographer to copy it verbatim. I at no time asked you to spell it out. The Stenographer was directed to do it, and it will be spread on the minutes, the (951) Court minutes.

BY MR. MARGIOTTI: I want to offer that as well as what appears before and afterwards.

BY JUDGE MURPHY: We say for the record ——

BY MR. MARGIOTTI: If the Court please, I believe that this was offered, but if it is not offered, we offer it at this time and ask leave to make photostats in substitution for the original record, which is Criminal Docket, "Relator's Exhibit No. 10," Pages 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, and 351.

BY MR. RYDER: If the Court please, I want the Court to understand—I believe probably the Court understands—that this record is the official record of the Court of Oyer and Terminer of Bucks County and contains not only reference to this case but reference to many, many other cases tried at that particular session of the Court of Oyer and Terminer of Bucks County. Now we have no objection, of course, as I have stated before, to the introduction in evidence of anything material relative to this proceeding. It is not my purpose to frustrate the cause of justice. I think we ought to have some sort of

understanding as to when these records will be returned to the Court of Oyer and Terminer of Bucks County.

BY JUDGE MURPHY: They have asked to substitute photostatic copies. That record is now in the custody of the United States Court and (952) will not depart from that custody until it goes into the Court of Bucks County. A matter of taking photostats of those pages would be a matter of minutes. Defense counsel, if they desire, can have it done on this floor by a photostat machine, and if it is done and the other parts are spelled out, the Court will direct—we may direct—we direct now that there be photostated those particular pages—instead of copying; it is quicker; then we will give counsel a few days to do that, or order it done and pay the bill when we get it.

BY MR. MARGIOTTI: Must we pay?

BY JUDGE MURPHY: I know you will—with your reputation for prompt payment; I am sure you will; and the book will go back—no problem about it.

BY MR. RYDER: I just want to get something on the record——

BY JUDGE MURPHY: If that machine won't take it, Wirth-Partridge's will.

We direct the book be turned over by the Court officer provided they pay the bill.

BY MR. MARGIOTTI: In the same exhibit we offer—"Exhibit No. 10" we offer in evidence Pages 353, 353, 354, 355, 356, 357, and 358.

Discussion

BY MR. RYDER: Under the same terms and conditions——

BY MR. MARGIOTTI: Oh, yes.

BY JUDGE MURPHY: (953) They will be received under the same terms and conditions as heretofore spelled out.

I might say, a bit facetiously, they will not be photostated until there is an order from defense counsel so there will be no question of payment. We will make it possible.

BY MR. MARGIOTTI: My friend said we forgot to introduce the chairs.

BY JUDGE MURPHY: What?

BY MR. MARGIOTTI: My friend said we forgot to introduce the chairs.

If the Court please, we offer in evidence from the Criminal Minutes Pages 391 of May Term 1948—392, 393, 394—those four pages, and ask leave to photostat them under further orders of the Court and substitute the photostats.

I think it would be better, Judge, to give this book a number. There was no number given to this book for some reason.

BY JUDGE MURPHY: All right.

(Exhibit marked "Relator's Exhibit No. 137.")

BY MR. MARGIOTTI: Those exhibits, Pages 391, 392, 393, and 394, are from "Exhibit No. 137."

BY JUDGE MURPHY: All right, is there objection?

BY MR. RYDER: (954) No objection.

BY JUDGE MURPHY: They will be received under the terms and conditions heretofore spelled out.

BY MR. MARGIOTTI: The Relator rests.

BY MR. VAN ARTSDALEN: The Commonwealth rests.

BY JUDGE MURPHY: All right, now the next order of business, we take it, is to get — we have two problems before us: One, we have the Commonwealth's motion for dismissal, and that will — since the jurisdiction of the Court is attacked — will have to be met. And then we have the Relator's Petition for a Writ of Habeas Corpus, and that will have to be met in the event the Court finds jurisdiction.

Insofar as the Court reserved ruling throughout as to the admissibility of the various evidence offered by the Relator, the judgment of the Court is now made up, we receive that evidence; it was reserved subject to objection; we have received the evidence offered upon which we reserved ruling. That is all evidence offered by the Relator on which we reserved ruling. That is all received in evidence.

Now the question is do the Commonwealth and the Relator, either or both — do each of you order a copy of the transcript so the Court will have something to work with?. Otherwise, we will not have a copy. It is going to be quite a record. You can either have it or not. If we don't have a transcript, we work from our notes. If we have a transcript, we work from both.

(955) Well, you can think it over and take it up with your respective colleagues. That is Problem No. 2 —

BY MR. MARGIOTTI: May I express myself on that? We will want a copy.

BY JUDGE MURPHY: The Relator will want a copy, and the Commonwealth will decide later on — Mr. Ryder and his colleagues — whether they do or not.

We have notes here, and we have noticed an unfortunate situation where defendants will come before this Court and ask for a new trial and then we have to wrestle with our notes and conclude what happened, and when they go to the Circuit Court the Circuit Court gets a transcript, we haven't had it at all. At least here we will have one transcript.

Now then, the next order of business is it will take some time for the transcript to be ready and for the Court to rule on the matter. We hope the Stenographer will — we are going into a Term of Court on Monday. We will make up for the pre-trials we missed this week. And then the Court will have to rule.

Now then, we heretofore issued a written Order to the Attorney General directing that the defendant be produced in Court under further order of this Court. For the time being the need of the defendant's presence in these parts has terminated temporarily at least and we hope, so far as this Court is concerned, for good because no matter what the outcome is one way or the other, it won't be before us, we hope.

Now then, we direct then that the custody of the Relator be continued by the State of Pennsylvania, but their obligation to keep him in Scranton is terminated as of the conclusion of (956) this hearing. If there is any further need for him to be brought here, we will issue a new order.

Now then, is there anything else that either side have in mind?

Well, the Order of this Court was that the execution be stayed until this Court has disposed of the matter and we notice by all of the newspapers that it has been continued by the Governor until sometime in the future, but apart from what the Governor has done, the Order is that the execution be stayed until we have disposed of it, and that is sometime after

the day after tomorrow and many days after tomorrow in the future—I don't know when.

Is there anything else, gentlemen?

BY MR. VAN ARTSDALEN: We have nothing.

BY JUDGE MURPHY: Do you have anything, Mr. Margiotti?

BY MR. MARGIOTTI: No, Your Honor.

BY JUDGE MURPHY: All right, the Court is now adjourned.

(Court adjourns.)

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(957) CERTIFICATE

This is to certify that the foregoing is a true and correct transcript of my shorthand notes taken at the time of the hearing in the above-captioned case.

Official Court Reporter

ORDER

Now, 1954, it is hereby ordered that the foregoing transcript be filed and made a part of the records in the above-captioned case.

United States District Judge

Vol. IV

TRANSCRIPT OF RECORD

(Pages 943 to 1269)

Supreme Court of the United States

OCTOBER TERM, 1955

No. 323

UNITED STATES OF AMERICA, EX REL. DAVID DARCY, PETITIONER,

vs.

EARL D. HANDY, WARDEN OF BUCKS COUNTY PRISON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 15, 1955

CERTIORARI GRANTED OCTOBER 24, 1955

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Volume IV

(2)

EXHIBITS.

(a)

Relator's Exhibits

RELATOR'S EXHIBIT No. 10(a).

OYER AND TERMINER CRIMINAL DOCKET,
BUCKS COUNTY, 1943,

(Page 329).

MAY TERM A. D. 1948.

BUCKS COUNTY, SS.

IN THE NAME AND BY THE AUTHORITY OF THE COMMONWEALTH OF PENNSYLVANIA

Relator's Exhibit No. 10 (a)

HONORABLE HIRAM H. KELLER PRESIDENT OF THE SEVENTH JUDICIAL DISTRICT, CONSISTING OF THE COUNTY OF BUCKS, BY VIRTUE OF SAID OFFICE, JUSTICE OF THE COURTS OF QUARTER SESSIONS OF THE PEACE AND OYER AND TERMINER AND GENERAL JAIL DELIVERY, FOR THE TRIAL OF CAPITAL AND OTHER OFFENSES IN AND FOR THE SAID COUNTY:

TO THE CLERK OF THE COURTS OF QUARTER SESSIONS OF THE PEACE, AND OYER AND TERMINER AND GENERAL JAIL DELIVERY OF THE COUNTY OF BUCKS, GREETING:

WE ORDER AND DIRECT THAT YOU ISSUE A VENIRE TO THE SHERIFF AND JURY COMMISSIONERS OF BUCKS COUNTY, AFORESAID, COMMANDING THE SAID SHERIFF AND JURY COMMISSIONERS TO EXPANEL, AND THE SAID SHERIFF TO SUMMON, A TRAVERSE JURY IN THE COURTS OF QUARTER SESSIONS OF THE PEACE AND OYER AND TERMINER AND GENERAL JAIL DELIVERY, CONSISTING OF 120 QUALIFIED ACCORDING TO LAW TO MAKE UP THE JURY REQUISITE TO INQUIRE OF AND PERFORM ALL THOSE THINGS ON OUR PART SHALL BE ENJOINED UPON THEM, AT THE TERM THEREOF TO BE HELD AT DOYLESTOWN, IN AND FOR THE COUNTY OF BUCKS, COMMENCING ON THE 17 DAY OF MAY A. D. 1948, NEXT AFTER THE DATE OF THIS PRECEPT, TO SERVE FOR THE TERM THEREOF COMMENCING ON THE 24 DAY OF MAY A. D. 1948, DATED AT DOYLESTOWN, THIS 12 DAY OF APRIL A. D. 1948.

HIRAM H. KELLER L.S.
PRESIDENT JUDGE

CALVIN S. BOYER L.S.
JUDGE.

Relator's Exhibit No. 10 (a)

1948 MAY 24—COURT CALLED AT 10 O'CLOCK A. M. HON. HIRAM H. KELLER, P.J. AND HON. CALVIN S. BOYER, J. PRESIDING.

EO DIE—LIST OF TRAVERSE JURORS SUMMONED AND RETURNED BY THE SHERIFF TO THE MAY TERM OF CRIMINAL COURT A. D. 1948.

1. GEORGE O. ADAMS 2. JOHN ARTIM 3. JACK EUGENE ALBERT 4. FANNIE H. ACUFF 5. HENRY LOUIS BERGER 6. L. MAY BRABENDER 7. JOHN F. BRADY 8. MARIAN S. BURTON 9. HELEN M. BODLEY 10. MANASS B. BARNDT 11. JOHN T. CLANCY 12. GEORGE R. COLVILLE 13. SARAH F. COOPER 14. ARTHUR CLARK 15. WILMER CRESSMAN 16. WILLIAM COATES 17. HARRIET C. CONKLIN 18. W. EARL CLEVENSTINE 19. SARAH CAVIN 20. PARKER DEHN 21. RAYMOND DAGER 22. WATSON S. DUDLEY 23. WALTER L. DILLIPLANE 24. JENNIE V. DIEHL 25. WALTER F. DELASHMUTT 26. KENNARD W. DUNGAN 27. EDNA M. DIXON 28. CATHARINE W. DANSER 29. GERTRUDE A. EVERETT 30. GEORGE D. EDWARDS 31. J. WARDELL ETTINGER 32. JACOB F. FOSTER 33. CHESTER A. FOULKE 34. T. SAMUEL FLEMING 35. ROSE T. FOY 36. J. PAUL FRANK 37. CHARLES Z. FRIES 38. FRANK C. GUTEKUNST 39. LILLIAN N. GERHART 40. DANIEL GUZMICH 41. WILLIAM GARRETT 42. DORA GROFF 43 WILLIAM F. GROOM (NON EST) 44. AUGUSTA GILL 45 JOHN M. HEMPHILL 46. LILLIAN HARRIS 47. MILDRED M. HOLBERT 48. ROBERT B. HENRY 49. GEORGE D. HACKETT 50. LOUIS H. HONEGGER 51. GEORGE S. HAVENS 52. GERTRUDE F. HALL (NON EST) 53. JOSEPH M. HILLEGAS 54. GEORGE F. HALLOCK

Relator's Exhibit No. 10 (b)

(MORT EST) 55. KATHRYN HOGG 56. ARTHUR HORTON 57. MARGARET E. HILGENDORFF 58. DOROTHY H. IRELAND 59. AGNES B. JEFFERSON 60. CATHERINE C. KRIKORY 61. WILHELMINA B. KLEIN 62. WALTER W. KUEMERLE 63. HELEN J. KOEHLER 64. MILDRED B. KRAMER 65. HELEN KLINE 66. CHARLES W. KIRK

RELATOR'S EXHIBIT No. 10(b).

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67. RAYMOND S. KNIGHT 68. HERBERT P. KUGLER 69. MARIE MILLER LIGHTCAP 70. RUBY LUNKENS 71. JANETTE LAINE 72. ELIZABETH M. LUFF 73. CLARA H. LUCKENBILL 74. MARIAN L. MASTON 75. RALPH R. MOYER 76. CARRIE M. MECK 77. ALME T. MEISSNER 78. GERTRUDE A. MILLER 79. ALLEN G. MOYER 80. MARY B. MORRIS 81. HAROLD K. MILLIKEN 82. FREDERICK C. MORRELL 83. HARVEY S. MOYER 84. OSWIN M. NASE 85. WILLIAM K. NICE 86. FLORENCE ORGILL 87. AARON S. OVERPECK 88. MADELON L. PRICE 89. TITUS PFLEIGER 90.

Relator's Exhibit No. 10 (b)

ALICE L. PICKETT 91. ESTHER P. PICKERING 92. MERTON RINIKER 93. SOL SCHACHTER 94. WILSON R. SWALLOW 95. STANLEY SAMES 96. GEORGE W. SHELLY 97. LOUISE SALTZMAN 98. CHARLES M. STRUNK 99. ERNEST E. SCHUMANN 100. GEORGE S. SCHMELL 101. JULIA SOLLIDAY 102. MILDRED SHARRETT 103. REED M. SINE (MORT EST) 104. J. NORMAN VANARTSDALEN 105. HERMAN VAN KIRK 106. KENT VANDEGRIFT 107. ELSIE P. VAN VOSSEN 108. WALTER F. WEBBER 109. LLOYD J. WEIERBACH 110. ANNA J. WILLIAMS 111. ALVIN B. WORTHINGTON 112. HELEN M. WIDMER 113. MABEL L. WEISS 114. HAROLD Z. WINDER 115. WILLIAM WILLIAMS 116. HARVEY D. WEISEL 117. JAMES H. WOOD 118. MARTIN R. WAGNER 119. JOHN E. WRIGHT 120. JOHN L. M. YARDLEY

EO DIE—THE TRAVERSE JURORS BEING CALLED, ALL ANSWERED TO THEIR NAMES BUT THE FOLLOWING:

HENRY LOUIS BERGER; JOHN T. CLANCY; W. EARL CLEVENSTINE; SARAH CAVIN; WATSON S. DUDLEY; WALTER F. DELASHMUTT; EDNA M. DIXON; FRANK C. GUTEKUNST; LILLIAN N. GERHART; DORA GROFF; WILLIAM F. GROOM; GEORGE D. HACKETT; GERTRUDE F. HALL; GEORGE F. HALLOCK; DOROTHY H. IRELAND; HELEN KLINE; HERBERT P. KUGLER; MARIE MILLER LIGHTCAP; CLARA H. LUCKENBILL; RALPH R. MOYER; ALLEN G. MOYER; HAROLD K. MILLIKEN; FREDERICK C. MORRELL; ESTHER P. PICKERING; SOL SCHACHTER; WILSON R. SWALLOW; GEORGE W. SHELLY; MILDRED SHARRETT; REED M. SINE; KENT VANDEGRIFT; ANNA J. WILLIAMS; HELEN M. WIDMER; WILLIAM WILLIAMS; AND JOHN L. M. YARDLEY.

Relator's Exhibit No. 10 (c)

RELATOR'S EXHIBIT No. 10(c).

OYER AND TERMINER CRIMINAL DOCKET,
BUCKS COUNTY, 1943.

(Page 331).

MAY TERM A. D. 1948

BUCKS COUNTY, SS.

IN THE NAME AND BY THE AUTHORITY OF THE COMMONWEALTH OF PENNSYLVANIA

HONORABLE HIRAM H. KELLER PRESIDENT OF THE SEVENTH JUDICIAL DISTRICT, CONSISTING OF THE COUNTY OF BUCKS, BY VIRTUE OF SAID OFFICE, JUSTICE OF THE COURTS OF QUARTER SESSIONS OF THE PEACE AND OYER AND TERMINER AND GENERAL JAIL DELIVERY FOR THE TRIAL OF CAPITAL AND OTHER OFFENSES, IN AND FOR THE SAID COUNTY.

TO THE CLERK OF THE COURTS OF QUARTER SESSIONS OF THE PEACE, AND OYER AND TERMINER AND GENERAL JAIL DELIVERY OF THE COUNTY OF BUCKS, GREETING:

WE ORDER AND DIRECT THAT YOU ISSUE A VENIRE TO THE SHERIFF AND JURY COMMISSION-

Relator's Exhibit No. 10 (c)

ERS OF BUCKS COUNTY, AFORESAID, COMMANDING THE SAID SHERIFF AND JURY COMMISSIONERS TO EMPANEL, AND THE SAID SHERIFF TO SUMMON, A TRAVERSE JURY IN THE COURTS OF QUARTER SESSIONS OF THE PEACE AND OYER AND TERMINER AND GENERAL JAIL DELIVERY, CONSISTING OF 120 QUALIFIED ACCORDING TO LAW, TO MAKE UP THE JURY REQUISITE TO INQUIRE OF AND PERFORM ALL THOSE THINGS WHICH ON OUR PART SHALL BE ENJOINED UPON THEM, AT THE TERM THEREOF TO BE HELD AT DOYLESTOWN, IN AND FOR THE COUNTY OF BUCKS, COMMENCING ON THE 17 DAY OF MAY A. D. 1948, NEXT AFTER THE DATE OF THIS PRECEPT, TO SERVE FOR THE TERM THEREOF COMMENCING ON THE 1 DAY OF JUNE A. D. 1948, DATED AT DOYLESTOWN, THIS 12 DAY OF APRIL A.D. 1948.

HIRAM H. KELLER L.S.
PRESIDENT JUDGE

CALVIN S. BOYER L.S.
JUDGE.

EO DIE—1948 JUNE 1—COURT CALLED AT 10 O'CLOCK A.M. HON. HIRAM H. KELLER—P.J. AND HON. CALVIN S. BOYER, J. PRESIDING.

EO DIE—LIST OF TRAVERSE JURORS SUMMONED AND RETURNED BY THE SHERIFF TO THE MAY TERM OF CRIMINAL COURT A.D. 1948. (SECOND WEEK)

1. FRANCES C. ASHWORTH (NON EST) 2. EDMUND C. ANDERSON 3. ALVIN ALBRECHT 4. CLARENCE G. ANGENY 5. JOHN ALCORN (MORT EST) 6. J. HARPER ATKINSON 7. DUDLEY E. BELL 8. ANNA

Relator's Exhibit No. 10 (c)

W. BUCHER 9. RUTH G. BLISS 10. IRENE E. BLANCHARD 11. FLORENCE BECK 12. JOHN BARBER 13. MAUDE C. BUCKMAN 14. VIRGINIA BRILLMAN 15. WALTER S. BERGER 16. MARGUERITE BERGSTRESSER 17. CHARLES A. BARNDT 18. CHARLES G. BRODIE 19. GEORGE BERNER 20. CATHRINE BENNETT 21. ELWOOD W. BUCK, SR. (NON EST) 22. ELIZABETH STETSON BARRY 23. FANNY W. BENNER 24. ANNA E. COLE 25. JAMES COURT 26. HUGH P. CASSEL 27. JOHN J. COLE (NON EST) 28. GLADYS A. CARNWATH 29. ROBERT H. CLARENDON 30. DOROTHY M. DARRAH 31. GERTRUDE DIXON 32. ERNA M. DOANE 33. ELIZABETH G. ELVILLE 34. MARTIN FREI 35. U. CALVIN FLUCK 36. IRENE FRACK 37. JOSEPH A. FERRY 38. JOHN G. FERGUSON 39. ALICE S. FREED 40. MIRIAM W. FLORY 41. FRANKLIN T. FRETZ 42. RACHEL L. FOX 43. ALLEINE C. GARDINER 44. EDWARD GREEN 45. H. ARTHUR HELLYER 46. JESSE H. HORNE 47. JOSEPH S. HETHERINGTON 48. EMILY O. HIGGENBOTTOM 49. WILLIAM F. HICKEY 50. JOSEPH F. HIBBS 51. JOHN E. HARROP 52. ERNEST F. HAMM 53. ROBERT W. HALL 54. JOHN M. HARDING 55. JOHN R. HANSBURY 56. MARIAN HARM 57. SAMUEL J. ILLICK 58. JAMES G. JACKSON 59. EVA F. KINSEY 60. RUSSELL F. KLEINMAN 61. GEORGE H. KERNS 62. CLIFTON LEEDOM 63. DELBERT LYNN 64. JOSEPH E. LOWNES 65. HAROLD LAKE 66. OLIVER C. LANDIS 67. MILDRED LEWIS 68. HAROLD L. LOUD

Relator's Exhibit No. 10 (d).

RELATOR'S EXHIBIT No. 10(d).

OYER AND TERMINER CRIMINAL DOCKET,
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69. EVERITT MILLER (NON EST) 70. ROGER MASON 71. HELEN VIRGINIA MANN 72. CHARLES L. MILLER 73. LEONARD MILLER 74. NICHOLAS MISLAN 75. EMILY V. MADDUX 76. R. BARCLAY MOON 77. ETHEL G. MOYER 78. ELSIE MARKLEY 79. STANLEY R. MCKNIGHT 80. MARY MAE MELCHIOR 81. ILSE MULLIGAN 82. WILLIAM MULLOY 83. ELMER OTT 84. FRANCIS M. PHILLIPS 85. HOWARD PRICE 86. ELIZABETH H. PREVOST 87. CARLTON A. PALMER 88. NORMAN S. PENROSE 89. GEORGE B. PAXSON 90. W. D. PARDOE 91. ANN L. REED 92. NOAH M. RICE 93. J. ALFRED RIGBY, JR. 94. FRANK REPETSKI 95. MABEL J. ROOK 96. VELMA A. ROSENBERGER 97. EDWARD J. RYAN (NON EST) 98. WILLIAM S. V. RODGERS 99. WILLIAM H. SLAUGHTER 100. LOVADA B. SCHLICHTER 101. WILLIAM FRANK SIGLEY 102. ELVA A. SHIVE 103. IRA M. SWARTZ 104.

Relator's Exhibit No. 10 (d)

JACOB SHIVO, JR. 105. ANNA K. SHAUDYS 106. JOHN MCLAREN STRONG (NON EST) 107. MARY E. SINGLEY 108. EMMA SHADDINGER 109. MABEL SENDERLING 110. MARY TYSON 111. WESLEY H. TALLEY 112. MARIE R. TORONGO 113. ALDA L. TETTEMER (MORT EST) 114. HARVEY M. WISMER 115. AMY P. WURST 116. MARVIN D. WEIDNER 117. PETER WICHSER 118. HARRY T. WESTLAKE 119. DORIS C. WILSON 120. HARRY W. WAMBOLD

EO. DIE—THE SECOND WEEK TRAVERSE JURORS HAVING BEEN CALLED, ALL ANSWERED TO THEIR NAMES BUT THE FOLLOWING:

FRANCES C. ASHWORTH; JOHN ALCORN; IRENE E. BLANCHARD; FLORENCE BECK; VIRGINIA BRILLMAN; CHARLES G. BRODIE; GEORGE BERNER; CATHRINE BENNETT; ELWOOD W. BUCK, SR.; ELIZABETH STETSON BARRY; FANNY W. BENNER; JAMES COURT; JOHN J. COLE; GLADYS A. CARNWATH; DOROTHY M. DARRAH; GERTRUDE DIXON; IRENE FRACK; JOSEPH A. FERRY; ALICE S. FREED; EDWARD GREEN; H. ARTHUR HELLYER; JOSEPH S. HETHERINGTON; JOHN M. HARDING; MARIAN HARM; MILDRED LEWIS; EVERITT MILLER; ELSIE MARKLEY; MARY MAE MELCHIOR; WILLIAM MULLOY; ELIZABETH H. PREVOST; MABEL J. ROOK; EDWARD J. RYAN; ANNA K. SHAUDYS; JOHN MCLAREN STRONG; MARY TYSON; MARIE R. TORONGO; ALDA L. TETTEMER; HARVEY M. WISMER; AMY P. WURST; PETER WICHSER.

Relator's Exhibit No. 12

RELATOR'S EXHIBIT NO. 12.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 23, 1947.

(Page 1).

BANDITS Shot Three Men in Holdup at Two Taprooms

Police Pick Up Suspects Who Have Been Identified

Four Young Men Wore No Masks—Police Say the YOUNG PHILADELPHIANS, Who Held Up Feasterville and Penndel Inns, Admit Robberies in New Jersey and Abington

(By a Staff Reporter)

Feasterville, Dec. 23—Four suspects were picked up in Philadelphia early today after a *quartet of armed bandits shot and seriously wounded three men and fled with $425 in two Bucks county taproom holdups.*

Relator's Exhibit No. 12

They gave their names at the Fourth Division detective headquarters as: Harold Foster, 23, of the 4000 block of Teasdale st.; David Darcy, 22, of the 5300 block of Large street; Harry Zeitz, 18, of the 5400 block of Oakland street, and Felix Capone, 16, of the 1700 block of Brill st.

They were all questioned early today in Philadelphia on a number of other robberies in the Philadelphia area. The accused have been identified by witnesses, according to the police, although formal charges had not been lodged up until 9:30 this morning. Police say the boys admitted several New Jersey robberies and one in Abington.

Two patrolmen arrested the men in an automobile at Frankford ave., and Friendship st., and said they answered the description of the bandits.

Terrorizing a wide suburban area, the *bandits*—all quite young, and two of them from well known Philadelphia families—*staged robberies at Feasterville and Penndel,* then eluded traps set by State Police and posse in both area.

SHOT THREE MEN

The gunmen shot Edward

(Please turn to Page 6)

(Italics Supplied)

RELATOR'S EXHIBIT NO. 13.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 23, 1947.

(Page 6).

BANDITS Shot Three Men

(Continued from First Page)

both of Feasterville, patrons at the Feasterville cafe on the Bustleton pike. They took a total of $195 from 15 patrons and the cash register. Upon leaving, the bandits fired again, wounding William Kelly, of Trevose, in the head.

Kelly was taken to the Abington Memorial Hospital, while State Police of the Langhorne detail took Wunsch and Hellerman wounds in the right arm and shoulder.

While a widespread police hunt got under way, the *bandits* entered Deacon Inn, near Penndel taking $140 from 12 male customers and $100 from the proprietor, Fred Lachenman.

Eight State troopers from Langhorne and County Detective Anthony Russo, of Bristol, were working on the case throughout the night.

Midnight Raid

According to Corporal R. D. Evans, the *thugs* first entered the Feasterville cafe a few minutes before midnight. Fif-

teen men and women patrons were inside the place. They had been watching a television broadcast of prize fights. The intruders asked to be served and while James Brown, operator of the place, was complying, the *thugs* pulled revolvers from their pockets and ordered the patrons to line up against the bar.

Women Ran Screaming

Quickly, the *holpup men* removed more than $150 from the pockets of the customers, then took $45 from a cash register. A woman patron ran outside as the holdup was in progress screaming for help

Her actions apparently upset the *bandits*. When two patrons, Wunsch and Hellerman, hesitated in handing over their wallets, all of the *thugs* opened fire on them. Both fell to the floor wounded.

Then the *bandits* ran outside and started for their waiting automobile. Again, the woman patron screamed, this time in an attempt to attract neighbors. Kelly, who was passing, went to her assistance. Without any warning, one of the robbers shot him.

Rob Deacon Inn

Upon entering the Deacon Inn on the Lincoln Highway near Penndel, all the *bandits* pulled their weapons from their pockets as they entered the place. One man stood guard at the front door to the establishment as the others ordered 12 male patrons to remain quiet. Then they took about $140 from the pockets of the customers.

When Lachenman, 58, the proprietor of the inn, made a

motion toward a telephone, one of the *thugs* fired a warning shot above the bar. Before fleeing the men took approximately $100 from a cash drawer.

Eye Witness Story

An eye witness account of the holdup at the Easterville Cafe was related to a "Daily Intelligencer" reporter this morning by John Naysmith, a nephew of James Brown, former owner of the place, who resides in the building with Naysmith and his wife.

"I was back of the bar at about 11:30 last night and there were about 18 customers in the place", Naysmith related. Some of the customers were playing shuffleboard in a rear room. Three young men about 22, all white, and unmasked, came into the place brandishing guns. One of them leaped over the bar, yelling 'This is a stick-up'. One went to the back room and in there the group started to wrestle the *bandit*. The *bandit* got loose and ordered the men out of the back room into the main tap room.

"A woman from Fox Chase ran out of my place about this time and across the street to the Buck Hotel to get help. One of the *bandits* fired his gun.

"Wunsch's father-in-law was in the main tap room. He was able to get his son-in-law out of the door while the *bandits* were still inside. Hellerman, who had also been shot, with Wunsch, was lying on the bar room floor.

"The *bandits* emptied my cash register of between $68 and $70. They then made all the customers put their wallets on the bar and the thugs hurriedly emptied them. Then the *bandits* took wrist watches from five or six customers. My wife was in the kitchen of the place and she, too, was ordered into the main bar room during the holdup.

Relator's Exhibit No. 13

"The *bandits* shot out the telephone and walked out the front door, as one *bandit* ordered, 'Keep quiet for quite a while.' Then they shut the door, but in a few seconds, one of the *bandits* again opened the door, looked inside and waving his gun, called out, 'Be sure, don't move, and a Merry Christmas to you all' ".

The *bandits* disappeared in a 1939 Plymouth sedan, the same machine in which they were picked up early today in Philadelphia.

(Italics supplied)

Relator's Exhibit No. 14

RELATOR'S EXHIBIT NO. 14.

DOYLESTOWN DAILY INTELLIGENCER.
DECEMBER 24, 1947.

(Page 1).

BANDITS Admit Shooting Five Persons in Holdups

Bucks county authorities including State Police of the Langhorne sub-station are assisting in the check-up of the series of tavern robberies in the Bucks and Philadelphia counties area by *a quartet of "trigger-happy" youths.*

The four boys—*all Philadelphians*—admit the Feasterville cafe holdup and another near Penndel, together with several others in Delaware, Montgomery and Bucks counties and at three points in South Jersey.

The boys admitted shooting five persons all told, including three in the Bucks county holdups on Monday night.

At the Abington Memorial Hospital, the chief resident physician told a "Daily Intelligencer" reporter that the condition of William Kelly, of Trevose, one of the victims of the shooting was still critical. He was shot through the head, but the bullet missed his brain.

In their first questioning yester day Lt. John Hanlon asserted that the *gunmen* had confessed staging the Bell

Relator's Exhibit No. 14

Corner Tavern holdup in Rhawnhurst on Dec. 6, in which two men, one a city fireman, were wounded and a third injured.

One Suspect is 16

Three of the men, identified as Harold Foster, 23, of Teesdale st., near Frankford ave.; David Darcy, 22, of Large st., near Bridge, and Harry Zeitz, 18, of Oakland st., near Sanger; were held for a hearing today at Paul and Ruan sts. The fourth, Felix Capone, 16, of Brill st., near Duffield, was removed to the House of Detention for action of juvenile authorities.

The three latest victims of blasting tavern gunfire, shot down in the Feasterville Tavern, Bustleton pike and Bridgetown rd. late Monday night, remained in hospitals yesterday.

Allen Hellerman, 45, of 3453 Palmetto st., was in Nazareth Hospital with bullet wounds of the neck. Edward Wunsch, 25, of Buck rd., Feasterville, was admitted to the same hospital with bullet wounds of the left shoulder and right arm.

In addition to shooting these victims, police said the youthful quar-

(Please turn to Page 5)

Relator's Exhibit No. 15

RELATOR'S EXHIBIT NO. 15.

DOYLESTOWN DAILY INTELLIGENCER
DECEMBER 24, 1947.

(Page 5).

BANDITS Admit Shooting

(Continued from First Page)

tet had *admitted carrying out the holdup of the Bell Corner Tavern*, operated by Mrs. Theresa Deppenschmidt, at 8400 Bustleton pike, Rhawnhurst, on Dec. 6.

Fireman Wounded

In that burst of gunfire, Arthur Coffin, 54, of 9514 Cowden st., Phila., a city fireman, was shot through the chest and abdomen as he attempted to seize the weapon of one of the *thugs*. George Clinger, 39, of 3742 Poppy drive, was shot through the right leg and Walter Watton, 55, of 2055 W. York st., suffered a gashed right hand in trying to grab one of the *bandits' guns*.

Police said the quartet also had admitted carrying out tavern holdups at Hammonton, Palmyra and Camden, in

South Jersey; in Abington township, Montgomery county, and at Ridley Park, in Delaware county, in addition to the two Bucks escapades.

The Feasterville holdup was staged quickly and 18 patrons were terrified by repeated threats of the *bandits' willingness to "shoot it out".*

Leader is Boastful

Mrs. John Naysmith, wife of the tavern's owner, said all four drew weapons and that the *gang's* leader warned:

"Just behave yourselves. That way you won't get hurt. We're the guys who pulled the Bell Corner stickup and we don't take any nonsense."

As the *bandits* began to gather their loot, one said:

"I hope a couple of State coppers come in. We'll shoot them, too".

Patrons Robbed

The gang collected $70 from the tavern's till, then took a $59 and a $75 watch from George Roth, 38, of Feasterville; $45 and a $25 watch from Frank Fronstale, 45, of Bustleton pike, and about $200 in cash and jewelry from other patrons.

"He's Dead", One Says

Miss Winnie Wiley, 32, of 8300 Verree rd., a friend of Hellerman's ran to his side.

"Oh, Reds", she cried, "What have they done to you?"

Relator's Exhibit No. 15

"Don't bother, lady," one of the *gunmen* said. "He's dead".

At that point the four men turned and ran out, firing several additional shots as they fled.

Kelly, the man most seriously wounded, was standing outside, talking to a friend, Frank Walters, 28, of Feasterville, when one of the last shots struck him in the head.

(Italics supplied)

Relator's Exhibit No. 16

RELATOR'S EXHIBIT NO. 16.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 26, 1947.

(Page 1).

Murder Now Faces the Four BANDITS

William Kelly, 38, Trevose Died From Shot In Head

Dead Man Was Shot On Outside of Feasterville Inn When Bandits Fled After Shooting Two Other Men CALLOUSLY During the Holdup—Later Went To Penndel and Held Up Inn

Bucks County now has a *four-way murder case* on its hands as a result of the death of William Kelly, 38, Trevose, who was shot during the holdup of the Feasterville Tavern last Monday night. Kelly died in the Abington Hospital on Wednesday night.

The four *young Philadelphians* who were arrested by

Relator's Exhibit No. 16

Philadelphia police several hours after the holdup and shooting, will be brought to Bucks county some time today for a hearing and final arraignment before a Justice of the Peace.

Charges of murder will most likely be lodged against all four defendants, although the fatal shot was fired by only one of the quartet. In case of murder in Pennsylvania, all must be equally charged in a case of this type.

District Attorney Edward G. Biester and his assistant, Willard Curtin, will have charge of the prosecution of the *four youthful bandits*, and the details leading up to their trial—after they are brought into the Bucks county jurisdiction.

Three of the four men who, according to Philadelphia police, *have admitted the holdup* in which Kelly was fatally shot and two others were shot, will be brought from a cell in a Philadelphia station house, to Bucks county today. The fourth *bandit* will be brought from the House of Detention to Bucks county. State Police of the Langhorne sub-station will see to it that the accused arrive here safely.

Feeling Runs High

The general feeling of the public—in Bucks county at least—appears to be that no time should be spared in bringing the youthful

(Please turn to Page 5)

Relator's Exhibit No. 17

RELATOR'S EXHIBIT NO. 17.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 26, 1947.

(Page 5).

Murder Faces Four BANDITS

(Continued from First Page)

bandits to trial, and that it is a "break" for society at large to have the trials in Bucks county rather than in Philadelphia.

Those who will be given hearings before a Bucks county Justice are Harold Foster, 23, of Teesdale st., near Frankford ave.; David Darcy, 22, of Large st., near Bridge; Harry Zeitz, 18, of Oakland st., near Sanger, and Felix Capone, 16, of Brill st., near Duffield—all of Phila.

Kelly, who died in the hospital, was standing outside the Feasterville Tavern at Bustleton pike and Bridgetown rd., when the *four bandits* emerged from the place, still shooting after hitting two customers. One of the bullets hit Kelly in the head.

The other victims wounded were Allen Hellerman, 45, of 3453 Palmetto st., Phila., and Edward Wunsch, 25, of Buck rd., Feasterville, both of whom were taken to the Nazareth Hospital with bullet wounds. The condition of Hellerman and Wunsch is not considered serious.

After holding up the Feasterville Tavern, the same *four bandits* held up Deacon's Inn, on the Lincoln Highway, a half mile south of Langhorne. They got nearly $400 in cash at the Feasterville Tavern, and about $240 at Deacon's Inn.

(Italics supplied)

Relator's Exhibit No. 18

RELATOR'S EXHIBIT NO. 18.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 27, 1947.

(Page 1).

District Attorney Is Investigating Murder

Checking Up on Scene About the Holdups

One BANDIT Only 16

District Attorney Edward G. Biester left early today for Feasterville to check up on some additional information in preparation for the prosecution of *"Philadelphia's four young "trigger-happy"* bandits arrested in Philadelphia after killing a Trevose man in a taproom holdup last Monday night.

Yesterday the *bandits* were held without bail in Philadelphia by Magistrate William Hagan pending arrangements for their transfer to the Bucks County authorities

Relator's Exhibit No. 18

which was delayed yesterday somewhat because of weather conditions.

District Attorney Biester, however, conferred this morning with Assistant District Attorney Willard Curtin, of Morrisville, at Feasterville, where one of the holdups took place and where William Kelly was fatally shot outside the Feasterville Tavern.

The *Philadelphians* who will be transferred to Bucks county for trial on a charge of murder—after formal arraignment—should reach the Bucks County Prison before next Monday.

They were seized in Phila. after a wild chase by police of the northeast Philadelphia section and State Police of the Langhorne sub-station They were recognized from a radio description sent out shortly after they *shot their way out* of the Feasterville Tavern, leaving three wounded men at the scene.

William Kelly died in Abington Hospital Wednesday night. Two other victims, Allen Hellerman, Phila., and Edward Wunsch, Feasterville; were still in the Nazareth Hospital this morning.

Held without bail yesterday for a further hearing early next week are Harold Foster, 23, David Darcy, 22, and Harry Zeitz, 18, all of Phila. The fourth, Felix Capone, 16, has been turned over to the juvenile court authorities, and District .

(Please turn to Page 5)

Relator's Exhibit No. 19

RELATOR'S EXHIBIT NO. 19.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 27, 1947.

(Page 5).

Dist. Attorney Investigating

(Continued from First Page)

Attorney Biester will confer with them today in Philadelphia, concerning the 16-year-old suspect.

At yesterday's hearing, Lt. John Hanlon of the 4th Detective Division, Phila., testified that the four readily *admitted committing other holdups in the New Jersey communities of Palmyra, Camden and Hammonton and in Bucks, Delaware and Montgomery counties.*

(Italics supplied)

Relator's Exhibit No. 20

RELATOR'S EXHIBIT NO. 20.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 27, 1947.

(Page 2).

(Editorial).

Fast Police Work

THE ROUNDING UP of the *young gunmen* who robbed the Feasterville and Penndel safes, and *admitted many other robberies*, is something for which we can thank the police of the county and Philadelphia.

What the public and the police will be watching closely in what is done to these potential killers when they come before the bar of justice.

One of the victims of the *callous* shootings has since died.

Something else that is particularly worth while remembering is the statement of one of the witnesses that one of the *young gunmen* remarked that it was lucky that no State

Police were on the scene, because they also would have been shot.

When we stop to consider the number of policemen who have been killed by *trigger-happy bandits*, it is not difficult to believe that the *gangster* meant what he said.

We have always wondered why the police so often take chances with wanted men who are known to be gun-toters and potential killers.

It is especially surprising in view of the miscarriage of justice in Philadelphia recently . . . when a jury predominantly made up of women, gave the killer of two cops life imprisonment instead of the electric chair, especially in view of the previous record of the killer.

(Italics supplied)

Relator's Exhibit No. 21

RELATOR'S EXHIBIT NO. 21.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 29, 1947.

(Page 1).

Murder Victim Funeral Held Last Saturday

William Kelly, the Dead Man, POPULAR CITIZEN of the Trevose Area

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(Special to The Intelligencer)

Trevose, Dec. 29—Residents of this community paid their last respects on Saturday afternoon to a life-long resident of that community who became the innocent victim of four *"trigger-happy" bandits* in a holdup and shooting at Feasterville a week ago tonight.

The occasion was the funeral of William Kelly, 38, of Trevose, who died in the Abington Memorial Hospital last Wednesday night. He was standing outside the Feasterville Tavern a week ago tonight when he was struck in the head

Relator's Exhibit No. 21

by a bullet as the *four thugs*, shooting as they ran from a holdup, fled to their car.

Kelly, a native of the Feasterville section, was a *popular member of Trevose community* where he resided most of his life. He had been employed in Philadelphia. The funeral was held at the Churchville Cemetery.

Kelly is survived by his mother, four brothers and four sisters.

As plans were being completed for the funeral service on Saturday, the Bucks county and Philadelphia county authorities were in the Feasterville section with the *four youthful bandits* for the purpose of re-enacting the scene of the crime.

Up until this morning the four accused were still in the custody of the Philadelphia authorities, but they will be turned over to the Bucks county authorities this week.

They are Harold Foster, 23; David Darcy, 22; Harry Zeitz, 18; and Felix Capone, 16, all of Phila.

(Italics supplied)

Relator's Exhibit No. 22

RELATOR'S EXHIBIT NO. 22.

DOYLESTOWN DAILY INTELLIGENCER,
DECEMBER 31, 1947.

(Page 2).

(Editorial).

ERRORS OF JURORS

LONG BEFORE the Philadelphia murder jury, largely made up of women, outraged the public by sentencing a bad actor who had murdered two policemen in a gun battle, there was criticism of the inefficiency of jurors.

Courts very frankly excoriated juries for acquitting persons when the evidence was regarded as ample by the Judges.

One of the suggestions made was that we should have professional jurors who would be versed in court procedure, the weight and importance of evidence, and *courageous and conscientious in the performance of their duties.*

In the discussion, which suggested that the Judges should

Relator's Exhibit No. 22

impose the sentences, there was a demurrer . . . *that the Judges in murder cases, when facing the responsibility of fixing the sentences, had not always risen to the responsibility . . . but evaded it in many instances.*

However, it should not be overlooked that it is not only in murder cases that juries frequently render verdicts that it is difficult to explain. We have the same situation with reference to drunken drivers . . . and in coroner's juries when it comes to placing responsibility for fatalities on the highways.

The responsibility for miscarriage of justice does not rest alone with jurors . . . strange as their conclusions appear to be at times . . . but in the courts and in the public's mind as it is expressed in antagonism to punishment for certain types of offenders.

(Italics supplied)

Relator's Exhibit No. 23

RELATOR'S EXHIBIT NO. 23.

DOYLESTOWN DAILY INTELLIGENCER,
JANUARY 5, 1948.

(Page 1)

Four Held for Murder

(By a Staff Reporter)

Langhorne, Jan. 5—Held on a charge of murder, *four youthful Philadelphians* were this morning formally arraigned before Justice of the Peace Horace A. Cooper at his office here and commited to the Bucks County Prison, without bail, for the action of the grand jury at the February term of criminal court on February 9.

Charged with the fatal shooting of William Kelly, 38, of Trevose, in front of the Feasterville Tavern following a hold-up and robbery, the four charged with murder are Harry Zeitz, 18, who police say has confessed to firing the shot that killed Kelly, (although not intentionally); Harold Foster, 23; David Darcy, 22, and Felix Capone, 16.

The Commonwealth was repre-

(Please turn to Page 4)

Relator's Exhibit No. 24

RELATOR'S EXHIBIT NO. 24.

DOYLESTOWN DAILY INTELLIGENCER,
JANUARY 5, 1948.

(Page 4).

Four Held for Murder

(Continued from First Page)

sented this morning by Assistant District Attorney, Williard Curtin of Morrisville, who called but two witnesses.

The accused were brought to the hearing and returned to the Bucks County Prison by State Police Dane and Carfagno, of the Langhorne detail.

Dr. John C. Simpson, of 920 Swede St., Norristown, coroner's physician of Montgomery county, who performed an autopsy on William Kelly in the Abington Memorial Hospital on December 25, several days after the shooting, testified that the examination revealed that Kelly had died as the result of a gunshot wound in the head that caused cerebral hemorrhage.

Relator's Exhibit No. 24

Chief County Detective Anthony Russo, of Bristol, the prosecutor, testified that on December 22, the four accused boys signed statements concerning the crime. Harry Zeitz, Russo said, admitted firing the shot in the air "upwards and backwards," that hit Kelly.

The accused, except Darcy, are represented by counsel, so far. I. Louis Rubin, Bristol attorney, was at the hearing this morning representing Zeitz. He was the only attorney there this morning with the exception of Mr. Curtin for the Commonwealth.

Mr. Curtin gave no indication at the hearing or immediately following it, whether the commonwealth would press for the death penalty at the time of the trial.

(Italics supplied)

Relator's Exhibit No. 25

RELATOR'S EXHIBIT NO. 25.

DOYLESTOWN DAILY INTELLIGENCER,
JANUARY 16, 1948.

(Page 2).

The Gossiper

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* * *

Only today they get away with it oftener . . . because of the soft treatment they know they are going to get if they are caught . . . and, later, because they gamble with the idea that, if they get a smart and unscrupulous "mouthpiece" they can "beat the rap".

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* * *

If the mentally subnormal persons were given institutional care . . . and *courts and jurors were to dispense with a lot of the sentimentality about criminals . . . the general public would not face so many horrible crimes as horrify newspaper readers daily.*

(Italics supplied)

Relator's Exhibit No. 28

RELATOR'S EXHIBIT NO. 28.

DOYLESTOWN DAILY INTELLIGENCER,
JANUARY 27, 1948.

(Page 1.)

Coroner's Jury Acts in Kelly Slaying

Find He Dies of Gunshot Wound In The Head

Murder Trial Here

(Special to The Intelligencer)

Norristown, Jan. 27—At a brief inquest conducted by Coroner Winslow Rushong in the Montgomery County Court House, here, this morning, and attended by county authorities, the fact was established to the satisfaction of the coroner's jury that William Kelly, 38, of Trevose, met his death on December 24, last year, as a result of a gunshot wound.

Only two witnesses were called by District Attorney Edward G. Biester, of Bucks county, to establish another link that will lead to the prosecution of *four Philadel-*

(Please turn to Page 3)

RELATOR'S EXHIBIT NO. 29.

DOYLESTOWN DAILY INTELLIGENCER,
JANUARY 27, 1948.

(Page 3).

Coroner's Jury Acts

(Continued from First Page)

phia boys who will be charged with the murder of Kelly.

Kelly was shot twice during a hold-up at the Feasterville Tavern on the night of Dec. 22, and died in the Abington Memorial Hospital on Dec. 24.

Arrested after the holdup were the following youths, now in the Bucks County Prison at Doylestown, awaiting the action of the grand jury at the February term of court: Harold Foster, 23; David Darcy, 22; Harry Zeitz, 18; and Felix Capone, 16.

The first witness called before Coroner Rushong this morning was Pvt. Kenneth R. Dane, of the Langhorne substation of State Police, who *testified as to several of the highlights surrounding the holdup and shooting.* Trooper Dane testified that *Zeitz had signed a statement admitting that he fired two shots in the direction of Kelly as he was leaving the hotel with the others.*

The only other witness was Dr. John C. Simpson, Montgomery county coroner's physician, who testified that the cause of death was a gunshot wound in the head.

(Italics supplied)

RELATOR'S EXHIBIT NO. 31.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 2, 1948.

(Page 2).

(Editorial).

WHO'LL BE THE NEXT?

NOT AN ISSUE of the newspapers of this metropolitan area is without a *gruesome story* describing the brutal beating of aged men and women, on the streets or in their shops by holdup men.

Very often the victims of the brutes who beat them up have died.

So far as the authorities and the public are concerned, not a great deal of attention is being paid to the cases to see that the thugs are given impressive punishment which would intimidate other brutes from following the example set.

For the most part the thugs select as their victims elderly or old folks, or women. They have been taught not to tackle

the able-bodied, unless they are reinforced by a gun or can sneak up on the victims from behind, or attack him in pairs.

The able men who have been tackled have, in many instances, turned the tables on the thugs. So they select their victims carefully.

If juries and the courts will make examples of these cowardly enemies of society, there will be fewer of their assaults.

They are not merely roughnecks, but potential murderers.

It would be lamentable if citizens were forced to take the punishment of them into their own hands.

(Italics supplied)

Relator's Exhibit No. 34

RELATOR'S EXHIBIT NO. 34

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 6, 1948.

(Page 1).

Less Power for Juries

Harrisburg, Feb. 6 (INS)—A Legislative committee today opposed a Philadelphia judge's *proposal to relieve juries of the power to fix penalties in cases involving first degree murder.*

The joint State Government Commission's committee on penal laws and procedure, headed by Sen. John W. Lord, Jr., (R) Phila., chose to "preserve" the power of juries to impose the death sentence or life imprisonment on persons convicted of first degree murder.

Judge Harry S. McDevitt had recommended that the committee submit to the 1949 Legislature a *proposal to deprive jurors of the power, claiming they "do not know how to exercise it".*

McDevitt's *recommendation resulted from the trial of*

Relator's Exhibit No. 34

William K. Hallowell, 23-year-old slayer of two Philadelphia policemen, *who was given life imprisonment by juries in each of two separate trials.*

"It was preliminarily determined that the committee at this time was opposed to any change in the law taking the present power away from the jury to determine whether life imprisonment or death should be imposed in first degree murder cases", Lord explained.

However, Lord said the committee believed a change proposed to the 1947 General Assembly "would do much for enabling juries to assess proper verdicts in murder cases".

The proposal would permit juries to make two findings: First a verdict of guilt or innocence and secondly, a sentence of either life imprisonment or death. Lord explained that at present juries give sentence with the verdict of guilty.

(Italics supplied)

Relator's Exhibit No. 34

RELATOR'S EXHIBIT NO. 34.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 6, 1948.

(Page 1).

Murder and Manslaughter Cases on Criminal List

Nine Accused of Drunken Driving—MURDER CASE MAY BE CONTINUED—Two of The Manslaughter Cases Are Holdovers—43 Cases On the List

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One murder case with four accused and six involuntary manslaughter cases are scheduled for the February term of criminal court among the total of 43 cases, *to make it one of the most important criminal sessions in a long time.* The trial list shows 37 new cases and six continued cases.

The murder case charges Harold Foster, 23; David Darcy, 22; Harry Zeitz, 18; and Felix Capone, 16, with the death

Relator's Exhibit No. 34

of William Kelly, 38, of Trevose, *who was shot outside the Feasterville Tavern on the night of December 24, last year, following a hold-up.* Kelly died in the Abington Memorial Hospital, a short time after the shooting, and murder charges were lodged against the defendants who were arrested in Philadelphia and transferred to Bucks county.

District Attorney Biester said this morning that *the murder case is scheduled for the action of the grand jury when it convenes next Monday morning, Feb. 9, but that the case will in all probability be continued until the May term.*

* * *

(Please turn to Page 7)

RELATOR'S EXHIBIT NO. 35.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 6, 1948.

(Page 7).

Murder and Manslaughter

(Continued from First Page)

New Cases

Murder: Harold Foster, David Darcy, Harry Zeitz and Felix Capone.

* * *

(Italics supplied)

Relator's Exhibit No. 36

RELATOR'S EXHIBIT NO. 36.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 10, 1948.

(Page 1).

Four Youths Indicted for Feasterville Murder

Safely in the custody of four State troppers from the Doylestown sub-station of State Police, *four youthful Philadelphians charged with murder of an innocent by-stander following a tap room hold-up at Feasterville last December, were brought from the Bucks County Prison to the Court House shortly before 10 o'clock this morning.*

Shortly after court convened, District Attorney Edward G. Biester asked permission of the court to send the cases of the four youths before the Grand Jury for action.

Charged with being responsible for the death of William Kelly, 38, of Trevose, the trigger-happy bandits, arrested in Philadelphia after the hold-up of the Feasterville Tavern, are as follows:

Harry Zeitz, 18, who police say was the trigger-man who fired the fatal shot; Harold Foster, 23; David Darcy, 22, and Felix Capone, 16.

Relator's Exhibit No. 36

The neatly-dressed youths impressed court officers and spectators as high school juniors rather than murder-accused defendants, as they sat and listened attentively to the special charge to the Grand Jury delivered this morning by President Judge Keller.

The special charge dealt with murder. Eight women and ten men are serving on the Grand Jury. The charge was delivered in court room No. 1.

The four guarding troopers surrounded the four accused defendants at vantage points—and the sheriff, two deputy sheriffs and county detectives were also on hand.

Zeitz, the alleged "trigger-man" sat next to Sheriff Ahlum. Judge Keller took but 10 minutes to deliver the special charge. His closing remarks emphasized the point that if the jury finds that any of the accused, assisted in the

(Please Turn To Page 5)

Relator's Exhibit No. 37

RELATOR'S EXHIBIT NO. 37.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRURARY 10, 1948.

(Page 5).

Four Youths Indicted

(Continued from First Page)

crime in any way, they are equally guilty in the offense charged.

Six witnesses were then called before the Grand Jury in a separate room. They included the prosecutor, Chief County Detective Anthony Russo, of Bristol.

Zeitz is represented by Attorney I. Louis Rubin, of Bristol. Two other attorneys, Webster S. Achey and Frederick Smith are interested in the defense.

The grand jury returned true bills against all four defendants at 10:55 o'clock, this morning, and they now stand indicted on the charge of murder.

District Attorney Edward G. Biester then moved for a continuance of the cases until the May term of court on the grounds that one of the witnesses for the Commonwealth is confined to a hospital at present, and cannot appear in court, and that Foster, one of the defendants, still is without an attorney.

(Italics supplied)

Relator's Exhibit No. 38

RELATOR'S EXHIBIT NO. 38.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 11, 1948.

(Page 2).

(Editorial).

ENRAGED CITIZENS

MOB LAW IS NOT the kind we want in this country . . . but there probably were thousands of women, especially, who felt like cheering when they read that a 35-years-old truck driver, who was convicted of an attempted attack on a married woman of Calstadt, N. J. . . . *and was merely fined $25 . . . was tarred and feathered.*

Presumably they felt that $25, which is about what some brute would be fined for cruelty to a dog, *was not adequate punishment for the attack on the woman, that it was inadequate to intimidate others like the defendant from attempting similar attacks . . . and remembered that courts*

Relator's Exhibit No. 38

have even let rapists escape with ridiculously light punishment.

It is fair to believe that if the officials imposing such alarmingly light sentences would not have been so gentle in their attitude if the victims of attackers and rapists had selected girls or women of their own families as the victim of their beastliness.

The reason for such leniency is difficult to find . . . when the officials must realize that, even though there may be no more serious results than shock, the chances are that the victims will be psychologically affected for many years.

In a Delaware court at this time three men are on trial for attacking a young woman . . . and, if they are convicted, will face the death sentence.

(Italics supplied)

RELATOR'S EXHIBIT NO. 40.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 16, 1948.

(Page 1).

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10 YOUNG PROBLEMS

Something to worry about in the way of juvenile delinquency, has been furnished by ten Philadelphia boys now incarcerated in the Bucks County Prison.

Four of the boys are charged with murder.

Six of the boys are being charged today with robbery, fire-arms violations, stick-ups and burglary.

Ages of the boys make police and others wonder what's going to happen next. Two boys are juveniles at the age of 16. Another juvenile is 17. Two of the boys are 18; one is 20; one is 21; two are 22; and one is 23.

One of the 16-year-old boys carried a loaded revolver in his stocking, and *one 18-year-old boy was the one accused of pulling the trigger in the murder case.*

(Italics supplied)

Relator's Exhibit No. 40

RELATOR'S EXHIBIT NO. 40.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 16, 1948.

(Page 1).

Police Connect Six BANDITS Arrested Here With a Number of Robberies and Holdups

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THEY ALSO KNOW MEMBERS OF THE BOY-MURDER GANG

(By a Staff Reporter)

With the *arrest of another Philadelphia robber gang of six young bandits* by two alert Doylestown police officers, authorities have been able so far to pin at least six Philadelphia robberies and stickups on the accused, in addition to a $3,000 Bucks county robbery, a stolen truck job, firearms act violations—and an attempt to hold up Bucks county's most pretentious estate.

The investigation progressed rapidly after Assistant Chief of Police Clarence Irwin and Patrolman George Harton ar-

rested the six bandits early last Saturday morning in Doylestown, when they stripped them of firearms and 114 rounds of ammunition in the Doylestown police station.

The arrest was made while Irwin and Harton were on "routine patrol," and after they had discovered two of the *bandits* trying to make a get-away with a truck in the rear of Clymer's Department Store. The other four *bandits* were located in a "borrowed" car that was parked a half-block from the Clymer store.

The ages of the *bandits* range from 16 to 22. On the youngest *bandit*, when he was searched by Patrolman Harton, was found a revolver stuck inside his left stocking near the shoe-top.

All six *bandits* will be given hearings today before Justice of the Peace Russell B. Gulick. A seventh *bandit* was arrested on Sunday in Philadelphia in connection with the excapades of the other six and is held on a stolen property charge.

The Bucks County Prison was a beehive of police and Philadelphia detectives on Saturday afternoon. The *bandits* were questioned at length by Trooper John Mitchell, of the Doylestown sub-station of State Police, who will be the prosecutor in the case here in Bucks County.

Other police who questioned the

(Please turn to Page 4)

Relator's Exhibit No. 41

RELATOR'S EXHIBIT NO. 41.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 16, 1948.

(Page 4).

Police Connect Bandits

(Continued from First Page)

bandits on Saturday included Doylestown officers: Lieut. John J. Hanlon, of the 4th Detective Division, Phila.; State Police Detective Gene Carfagno, and Philadelphia Detectives Allen Kleppinger, Frank McCourt and Lawrence Adair.

* * *

Knew Other Gang

The police also learned that several of the bandits were acquainted with the Philadelphia boy murder gang that is now in the Bucks County Prison awaiting trial on a murder charge. Several of the accused asked about their friends as soon as they arrived at the Bucks County Prison.

* * *

(Italics supplied)

RELATOR'S EXHIBIT NO. 42.

DOYLESTOWN DAILY INTELLIGENCER,
FEBRUARY 18, 1948.

(Page 2).

(Editorial).

TIME FOR AN EXAMPLE

THE OVERFLOW of Philadelphia's young criminals into Bucks county, might, it seems reasonable to believe, be discouraged if the crooks were given sentences which would be impressive and get headlines large enough to be seen and become impressive.

Stiff sentences have had that effect before.

Once before it brought an epidemic of arson to an end for several years.

Another time it taught tramps, who had been filling the county jail and bedevilling the people of lower Bucks, to keep away from the county.

Recent arrests of two gangs of young criminals, one of them held for murder, should help to discourage these criminal forays into the county . . . especially if they are convicted and sent away for impressive periods.

Trying to find excuses for enemies of society invites more crimes.

(Italics supplied)

Relator's Exhibit No. 43

RELATOR'S EXHIBIT NO. 43

DOYLESTOWN DAILY INTELLIGENCER,
MARCH 1, 1948.

(Page 1).

CHARGED WITH MURDER, ASKS SEPARATE TRIALS

Court Smothered By Dust, Due To Remodeling

Adding New Room

Petitions for severance, asking for separate trials in the cases of David Darcy, 22, and Felix Capone, 16, charged with murder, were filed this morning in court.

They are two of *four Philadelphia youths* charged with

Relator's Exhibit No. 43

the murder of William Kelly, 38, of Trevose, last December 24, outside the Feasterville Tavern, following a hold-up.

Judges Hiram H. Keller and Calvin S. Boyer asked that the matter be heard in further detail this afternoon, in an effort to have a combination trial if possible, covering all defendants. Counsel for Darcy and Capone, however, stood on their legal rights, and stated that they would ask for separate trials as provided by law in cases of murder.

The court commented, "Separate trials in these cases will mean that it may take a year to dispose of the cases". Attorneys for the other defendants intimated today that they too will demand separate trials.

* * *

(Italics supplied)

Relator's Exhibit No. 46

RELATOR'S EXHIBIT NO. 46.

DOYLESTOWN DAILY INTELLIGENCER,
APRIL 2, 1948.

(Page 2).

(Guest Editorial).

Mild Sentence for Murder

From Phila. Inquirer.

As a deterrent to criminally reckless automobile drivers, the sentence of two-and-a-half to five years imposed on a man whose automobile killed a women pedestrian is grossly inadequate.

Judge Oliver rightly ruled that the man involved in the case was guilty of second-degree murder. It is certainly nothing less when a motorist, with a total disregard for the safety of others, uses the city streets as a race course, loses control and sends his car crashing over the sidewalk into a group of women.

Murder, whether with a gun or an automobile calls for

Relator's Exhibit No. 46

penalties that will properly punish the offender and stand as a clear warning to others. This sentence does neither.

If there were extenuating circumstances, there might have been some excuse for the light sentence. But police charged that this motorist was driving a stolen car, fled the scene of the accident, was racing another automobile and was intoxicated. Any of these, and especially the last, should have deprived the defendant of any claim to clemency.

It is the safety of the careful, law-abiding majority, rather than any hardships suffered by the guilty drivers, which should be the paramount consideration.

The criminal negligence responsible for the continuing slaughter on the highways *will not be cured until all culpable parties know their punishment will be sure, swift and severe.*

Light penalties will delay the achievement of real highway safety.

(Italics supplied)

Relator's Exhibit No. 48

RELATOR'S EXHIBIT NO. 48.

DOYLESTOWN DAILY INTELLIGENCER,
APRIL 17, 1948.

(Page 2).

(Editorial).

IF "SOB SISTERS" LAY OFF

IF "SOB SISTERS" lay off, three of the holdup men who were captured here, with an arsenal in their car, and sentenced in Philadelphia this week for crimes there . . . will be out of circulation and mischief for a term of years long enough to give them time to realize that crime doesn't pay . . . and also serve as a lesson to others.

They were sentenced to from 10 to 30 years in the Eastern Penitentiary by Judge Harry S. McDevitt . . . who commented that they would probably "wind up in the electric chair." The Judge made it clear that he has little hope that characters of their ilk will not learn the needed lesson . . .

Relator's Exhibit No. 48

and must be restrained from further victimizing the public.

"You wise guys start out with guns and usually wind up in the electric chair," added the Judge.

Unfortunately, despite adequate proof that the statement was not an exaggeration in many instances, *there still are Judges and Pardon Boards not yet convinced that thugs of that type should not be given an early opportunity to prey on the public.*

It seems to be time to stop making guinea pigs of the law-abiding members of society.

(Italics supplied)

Relator's Exhibit No. 49

RELATOR'S EXHIBIT NO. 49.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 7, 1948.

(Page 2).

(Editorial).

JURORS REBUKED AGAIN

TWICE WITHIN a few months a jury in Philadelphia has been rebuked by a Judge for failing to exercise intelligence in passing upon the guilt or innocence of a defendant.

Once a jury was criticized severely by the Court for its palpably unintelligent or soft-hearted decision in the case of a man accused of the murder of two policemen.

In the other trial this week a jury acquitted a man on a charge of burglary . . . after he had been caught with his arm through a broken window, and in possession of a set of burglar's tools.

The news story did not reveal whether the man's previous

Relator's Exhibit No. 49

record, including an automobile theft and complicity in a murder was introduced in evidence. The chances are that it was not. But without this, the Judge charged, there was no reason for them to acquit him in the face of the positive evidence said to have been presented.

It makes it more and more apparent that untrained men and women, not familiar with court rules or the proper weighing of evidence, are lacking in temperament or ability to serve efficiently.

For years there has been a discussion over whether there should not be trained professional jurors . . . instead of the "good men and true" supposed to be drafted for the purpose.

(Italics supplied)

Relator's Exhibit No. 51

RELATOR'S EXHIBIT NO. 51.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 14, 1948.

(Page 1).

FOUR MURDER AND FOUR MANSLAUGHTER TRIALS LISTED

Four murder cases are listed on the docket for the May term of county criminal court that opens next Monday, but only two will be tried during the approaching term.

The two murder cases for trial are those of Harold Foster, 23, and Harry Zeitz, 18, both of Philadelphia. They will be tried for their alleged part in the murder of William Kelly, 38, of Trevose, last December, when four youths held up a tap room and started shooting after a $425 robbery.

Two others, David Darcy, and Felix Capone, will be tried later.

Because of the extensive list for the May term, there will probably be sessions of night court during *the murder trial*

Relator's Exhibit No: 51

of Foster and Zeitz scheduled to start Monday, May 24.

Foster will be defended at the trial by Attorneys Donald B. Smith, Perkasie, and William Freed, Jr., of Quakertown, both appointed by the court. Zeitz, who is said to be the one who fired the fatal shot that resulted in Kelly's death, will be defended by Attorney I. Louis Rubin, of Bristol.

* * *

The continued cases from the September term of 1947 are listed as follows:

** * * Harold Foster; David Darcy, Harry Zeitz and Felix Capone, murder: * * *.*

* * *

(Italics supplied)

Relator's Exhibit No. 55

RELATOR'S EXHIBIT NO. 55.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 24, 1948.

(Page 1).

FEASTERVILLE MURDER CASE DEFENDANTS GO ON TRIAL

The Feasterville Tavern murder cases got under way this morning in county criminal court.

Four youthful Philadelphians are charged with the murder of William Kelly, 38, of Trevose, who was shot on the night of Dec. 22, 1947, and died several days later.

Only two of the defendants charged with the murder will go on trial this term.

They are 18-year-old, red-headed Harry Zeitz, of Oakland st., Phila., who is *alleged to have fired the shot that fatally injured Kelly;* and Harold Foster, 23, of Teasdale st., Phila.

The other two defendants, David Darcy, 22, and Felix Capone, 16, will be tried at a later term of court.

Relator's Exhibit No. 55

The case is being tried before Judge Calvin S. Boyer in No. 1 Court Room.

Zeitz is being defended by Attorney I. Louis Rubin, Bristol, while Attorneys Donald Smith, Perkasie, and William Freed, Jr., Quakertown, are defending Foster. The Commonwealth's case is being prosecuted by District Attorney Edward G. Biester.

Zeitz, dressed in a dark suit, and wearing his military discharge button on his coat lapel, and Foster, also neatly dressed in a dark suit, were *brought into court by two State Troopers*, Corporal Harold Dando and Trooper Leland Emory. *Other guards and Sheriff's deputies* were stationed nearby as Zeitz and Foster were arraigned before the bar of the court at 10:55 this morning.

The defendants were two of the four who held up the Feasterville Tavern on Dec. 22 and after a robbery of inn patrons eluded police after first firing a shot outside the

(Please turn to Page 4)

Relator's Exhibit No. 56

RELATOR'S EXHIBIT NO. 56.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 24, 1948.

(Page 4).

Feasterville Murder Case

(Continued from First Page)

tavern—the shot that caused Kelly's death.

All jurors were withdrawn from the court room at 11 a.m. and the long ordeal of examining the jurors individually got under way as one juror at a time was called in.

Jurors Being Examined

John E. Wright, 26, Yardley farmer, was the first juror examined. He was followed by Manass B. Barndt, 69, Sellersville salesman. , farmer, was the first juror examined the first juror drawn as to his health, age, occupation, or whether he had formed any opinion in the case.

"*I read the story in the newspapers*, but I could render an opinion according to the evidence as presented.

"I do not believe in capital punishment."

Wright was challenged by the Commonwealth because of his objection to death penalty.

Relator's Exhibit No. 56

Manass Barndt told the defense attorney that he was not in good health, and was excused.

Titus Pfleiger, Quakertown, R. D., carpenter, had his own Bible in his hand when asked to be sworn, and then volunteered that he *was not in favor of capital punishment. The Commonwealth's challenge for cause was sustained.*

Oswin M. Nase, 73, of Sellersville, retired, told the Court that *his hearing is 40 per cent impaired. He was excused.*

George S. Schmell, 54, a Plumstead township farmer, and fifth juror examined said his Mennonite faith would not permit his conscience to impose the death penalty. *He was challenged for cause.*

Mrs. Fannie H. Acuff, 65, Langhorne housewife, was the sixth juror examined and the first woman called. *The defendant, Foster, challenged peremptorily.*

No jurors had been selected up until 11:30 a. m.

(Italics supplied)

RELATOR'S EXHIBIT NO. 57.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 25, 1948.

(Page 1).

Only 7 of the 14 Jurors Selected in Murder Case: Many Oppose Death Penalty

Kelly Murder Jury

No. 1—Alvin B. Worthington, New Hope, foreman; auto dealer.
No. 2—George S. Havens, New Hope, farmer.
No. 3—Mrs. Mildred M. Holbert, Warrington, housewife.
No. 4—C. Raymond Dager, Forrest Grove, farmer.
No. 5—Mrs. Augusta Gill, Bristol, housewife.
No. 6—Mrs. Catherine W. Danser, Yardley, housewife.
No. 7—John M. Hemphill, Hatfield, R.D., farmer.

Thirty-five men and women were called and examined for jury duty yesterday at the opening of the *trial of two Philadelphia youths charged with slaying a man during a holdup at the Feasterville Inn last December 22.*

Out of the all-day effort, only six were selected up until

Relator's Exhibit No. 57

the time that court adjourned Monday afternoon at 5 o'clock. The jury that will try Harry Zeitz, 18, and Harold Foster, 22, is headed by a New Hope automobile dealer who was selected as foreman. He is Alvin B. Worthington, who was the eleventh juror examined.

Court got under way this morning at 10 o'clock and jurors are being called in an effort to complete the panel before adjournment today. Eight more were needed when court opened this morning, including two alternate jurors.

The defendants are charged with the murder of William Kelly, 38, of Trevose, who was standing near the Feasterville Inn when a shot allegedly fired by Zeitz, struck him, and caused his death two days later in the Abington Memorial Hospital.

Two other defendants will be tried for the same crime at a later term of court. They are David Darcy 22, and Felix Capone, 16, *also Philadelphians.*

The trial will most likely last the remainder of the week with night sessions scheduled after the testimony gets under way. Judge Calvin S. Boyer is the trial judge.

Records show that the *two Phila-*

(Please turn to Page 6)

Relator's Exhibit No. 58

RELATOR'S EXHIBIT NO. 58.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 25, 1948

(Page 6).

Only Seven Jurors Selected

(Continued from First Page)

delphians on trial are also charged with holdups in Philadelphia, Montgomery and Delaware counties, and in South Jersey. One of the holdups took place at the Bell Corner Tavern, Rhawnhurst, last Dec. 6, when a Philadelphia city fireman was shot and another man injured.

The Feasterville Inn holdup netted the four youths over $400 in cash and jewelry, and was followed the same night by a holdup in Penndel before the four Philadelphians eluded police and got back to Philadelphia where they were arrested.

Other Jurors

The No. 2 juror selected was *George S. Havens*, a farmer, living near New Hope.

William K. Nice, Hatfield, was excused because he had conscientious scruples against the death penalty as a number of others had who were examined yesterday.

Relator's Exhibit No. 58

The first woman selected was *Mrs. Mildred M. Holbert*, wife of Howard Holbert, Warrington purchasing agent, and mother of three children, who told the attorneys and court that she had no objection to capital punishment when the evidence warranted it.

The sacro-iliac condition that has been bothering him and may become aggravated as a result of lengthy confinement, excused *Walter Kuemerle*, retired Andalusia resident.

Mrs. Mabel L. Weiss, 54, wife of a prominent Warminster florist, and the twenty-second to be examined, said the only objection that she had to serving on the jury is that "her husband needs her very badly at home to help in the greenhouse." The Commonwealth exercised a peremptory challenge.

The fourth juror accepted was a Forest Grove farmer, *C. Raymond Dager*.

Mrs. Elizabeth M. Luff, Richboro housewife, was challenged peremptorily by the Commonwealth.

The fifth juror accepted was *Mrs. Augusta Gill*, Bristol housewife.

Mrs. Lillian Harris, of Andalusia, was excused for cause by the Commonwealth, after she objected to the death penalty. She said she "didn't like it."

Mrs. Catherine W. Danser, of Yardley, was the 35th juror examined and the last called before adjournment Monday afternoon, and was selected as the sixth juror.

Jurors, before adjournment Monday afternoon, were placed in the custody of two tipstaves, *Mrs. Horace E. Gwinner and Clarence H. Danenhower*, and until the trial is over, will be quartered at the Doylestown Inn.

Relator's Exhibit No. 58

Tuesday Morning

Judge Boyer greeted a school boy and girl audience of about 200 from Council Rock and Hatboro High Schools this morning. They are spending the day attending the murder trial. The various operations in connection with selecting jurors for a murder case were explained to the students by Judge Boyer.

The first juror drawn this morning, *Harvey D. Weisel*, Hilltown, was excused because of professional relations with one of the defense attorneys.

The defense challenged *Mrs. Sarah F. Cooper*, of Bristol, peremptorily.

Perker Dehn, 46, New Hope realtor, the 39th juror called *was challenged peremptorily by the defense.*

A Pennsylvania Railroad foreman, *John Brady*, of Bristol, was emphatic about his disbelief in capital punishment, and was challenged for cause.

J. Wardell Ettinger, Newtown, mill foreman, who knew the victim, Kelly, in this case, was challenged for cause.

Ernest Schumann, retired machinery manufacturer of Quakertown, was challenged peremptorily by defense. James H. Wood, Morrisville, was likewise challenged by the defense.

Mrs. J. Koehler, Perkasie housewife, the 44th juror called, was challenged for cause.

John M. Hemphill, 71 years old vegetable farmer living on the Bethlehem Pike, near Hatfield, was selected as the No. 7 juror at 11:30 this morning.

(Italics supplied)

Relator's Exhibit No. 57

RELATOR'S EXHIBIT NO. 57.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 25, 1948.

(Page 1).

MERCY IS OVERDONE

Washington, May 24.—Justice Robert H. Jackson today accused his Supreme Court colleagues of *giving hardened criminals too many chances to get out of jail.*

He filed a sharply-worded dissenting opinion as the court ruled 5 to 4, that a lower court must take another look at the case of an Alcatraz prisoner sent up in 1935 for a 65-year term for bank robbery.

Jackson pointed out that lower courts had turned down four earlier appeals from the convict, Homer Price, of Lansing, Mich., who claims his original trial was unfair.

* * *

(Italics supplied)

Relator's Exhibit No. 59

RELATOR'S EXHIBIT NO. 59.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 26, 1948.
(Page 1).

Trevose Murder Trial Jurors Being Selected

Up to Last Evening Only Eight Were Accepted

New List Is Called

Zietz-Foster Murder Jury

No. 1—Alvin B. Worthington, New Hope, auto dealer; foreman.
No. 2—George S. Havens, New Hope, farmer.
No. 3—Mrs. Mildred M. Holbert, Warrington, housewife.
No. 4—C. Raymond Dager, Forest Grove, farmer.
No. 5—Mrs. Augusta Gill, Bristol, housewife.
No. 6—Mrs. Catherine W. Danser, Yardley, housewife.
No. 7—John M. Hemphill, Hatfield RD, farmer.
No. 8—Mrs. Marion S. Burton, Bristol, housewife.
No. 9—Elmer F. Smith, of Quakertown, retired.

The third day of the trial of *two Philadelphia youths charged with the murder of William Kelly, outside the Trevose Inn last December*, got under way this morning at 10 o'clock with 50 new jurors who were conscripted last night

(Please turn to Page 8)

Relator's Exhibit No. 60

RELATOR'S EXHIBIT NO. 60.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 26, 1948.

(Page 8).

Trevose Murder Trial

(Continued from First Page)

by Sheriff H. Raymond Ahlum of Quakertown, and his deputies.

The original venire of 78 jurors was exhausted yesterday afternoon after two days of detailed examination of men and women many whom were challenged for various reasons. When the last juror to be called was examined, just before adjournment yesterday afternoon, the trial group numbered but eight jurors, with six more to go, including two alternates.

When the jury is completed the trial of Harry Zietz, 18, the alleged trigger man in the murder, and Harold Foster, 22, will get under way.

The Commonwealth examined all jurors as to whether they have conscientious scruples about capital punishment.

indicating that the Commonwealth may ask for the death penalty.

It took all day Tuesday to agree upon two jurors, No. 7 and No. 8. They are John M. Hemphill, Hatfield farmer, and Mrs. Marion S. Burton, Bristol.

Seventh Juror Accepted

John M. Hemphill, 71-year-old farmer living near Hatfield, was accepted as the No. 7 juror.

Mrs. Florence Orgill, Doylestown, R.D., was challenged peremptorily by Zeitz's attorney, Mrs. Carrie M. Meck, Richland township, was challenged for cause.

The 50th juror called was John Artim of Bristol, an architectural designer, employed in Trenton. He was challenged peremptorily by Zeitz's attorney.

The last juror examined before noon recess Tuesday was Mrs. Catherine C. Krikory, of Richland township, housewife, who was excused because of a 2-year-old child at home.

Tuesday Afternoon

Mrs. Gertrude A. Miller, Perkasie housewife, challenged by Commonwealth for cause—conscientious scruples.

Mrs. Ruby Lukens, of Doylestown, mother of four children, was the 55th juror excused, because of illness.

Employed in Phila., Arthur Horton, 37, of Newportville, an expediter in a radio manufacturing plant was challenged peremptorily by defendant Foster.

Daniel Guzmich, of Upper Black Eddy, said he was a Boy Scout leader, a Sunday school teacher and since being

Relator's Exhibit No. 60

old enough to vote and think matters out for himself, he has not believed in capital punishment. He was challenged for cause by the Commonwealth.

Jacob F. Foster, Morrisville builder; was excused by consent of both sides because of business relationship with counsel in the case.

Mrs. Madelon L. Price, Morrisville housewife, was excused because of poor health.

Raymond S. Knight, 43, of Langhorne Manor, a carpenter-contractor, was challenged for cause. He knew the victim and told the court he had formed a definite opinion.

Herman VanKirk, assistant steward of Bristol Elks, who opposes capital punishment, challenged for cause by Commonwealth.

Mrs. Alice L. Pickett, 53, Langhorne R.D. 2; was the 62nd juror questioned, with only 15 jurors remaining on the current panel. At this point Judge Boyer summoned Sheriff H. Raymond Ahlum for special venire forms. Mrs. Pickett was challenged for cause on grounds of her disapproval of death sentence.

Rose T. Foy, of Hatfield R.D., a beauty councellor, was challenged by the Commonwealth peremptorily.

Joseph M. Hillegas, Quakertown farmer, who knows Attorney Freed for defense, was excused on consent of both sides.

Mrs. Mary B. Morris, 42, Plumstead township housewife, mother of two children, the 65th juror called; was challenged by Zeitz's attorney perentptorily.

Mrs. Marion S. Burton, 61, Bristol, housewife, and a member of Fallsington Friends, said she did not object to capital punishment; was accepted as No. 8 juror at 3:10 p.m., the 66th juror called.

Relator's Exhibit No. 60

Special Venire

Judge Boyer issued a special venire of 50 jurors be returned Wednesday morning in an order issued at 4.35 p.m., Tuesday afternoon.

Among the last members of the original panel examined was George R. Colville, Bristol clerk excused for defective hearing.

Charles W. Kirk, 69-year-old Forest Grove farmer, was the 69th juror examined, was challenged for cause. His opinion is fixed, he told the court.

Elsie P. VanVossen, of Bristol R.D. 1, a clerk-stenographer employed by the Reading Railroad in Philadelphia was the 70th juror examined, and was challenged peremptorily by the Commonwealth.

Wednesday Morning

The case got under way at 11 this morning after a delay of an hour as the new jury panel was being prepared.

Lewis L. Keller, of Quakertown, was the first called out of the new panel and was challenged for cause—conscientious scruples.

Elmer F. Smith, of 10 Hellertown Ave., Quakertown, were accepted as the No. 9 juror at 11:15 this morning.

(Italics supplied)

Relator's Exhibit No. 61

RELATOR'S EXHIBIT NO. 61.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 27, 1948.

(Page 1).

Murder Defendants on the Way to Court



(Daily Intelligencer News Photo)

Handcuffed to police are *two Philadelphia youths* on trial in the Bucks County Court House, *charged with the murder* of William Kelly, Trevose, last December. Left to right: Coperal Harold Dando, commanding officer of the Doylestown sub-station of State Police; *Harry Zietz, 18, alleged trigger-man in the slaying;* Sheriff H. Raymond Ahlum; *Harold Foster, 23, also charged with murder;* Trooper Leland Emory, of the Doylestown sub-station; and Deputy Sheriff Harry Ross.

(Italics supplied)

Relator's Exhibit No. 61

RELATOR'S EXHIBIT NO. 61.

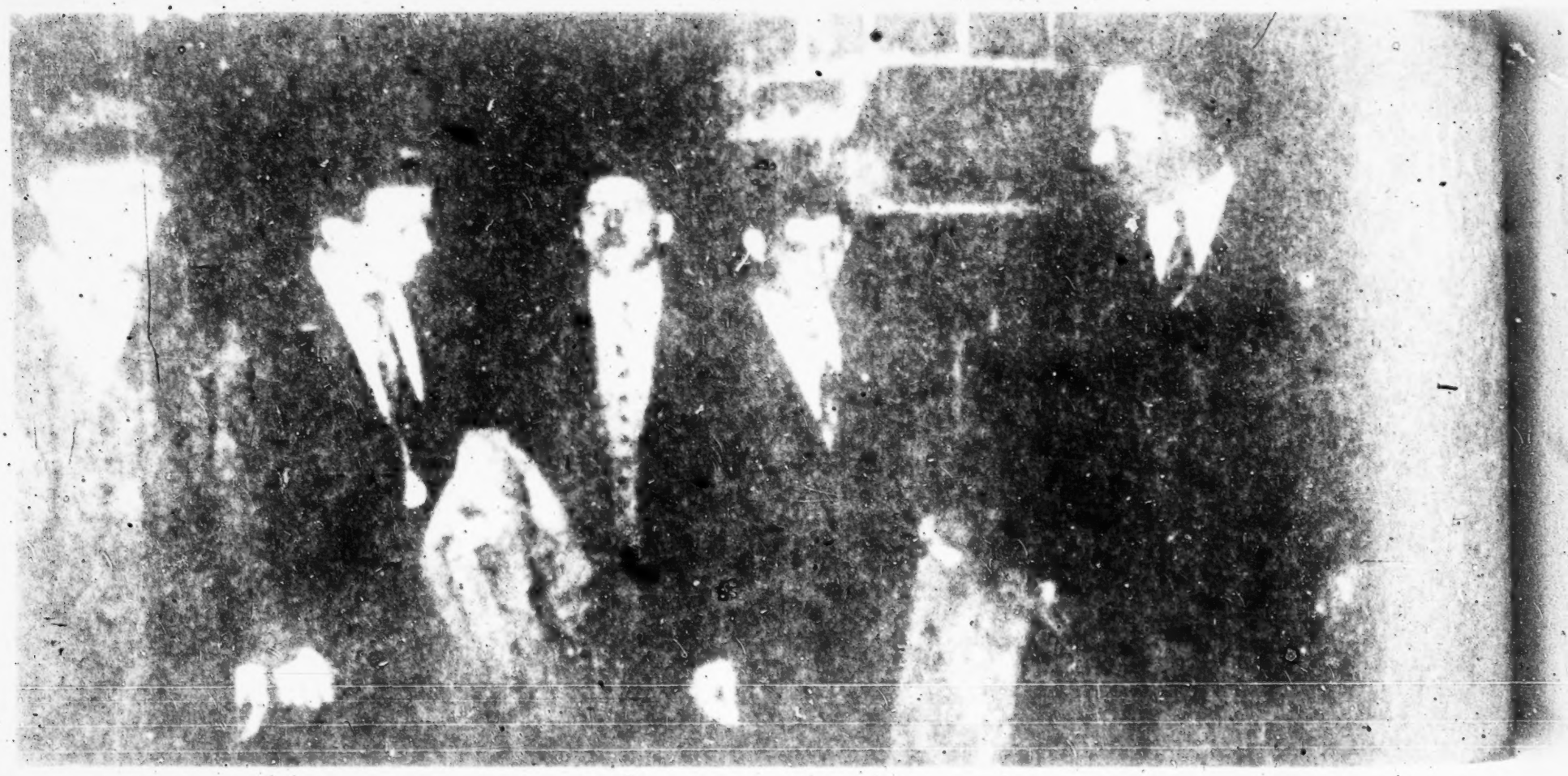
DOYLESTOWN DAILY INTELLIGENCER,
MAY 27, 1948.
(Page 1).

128 Jurors Called in Murder Trial, But Only 11 Seated

This Morning Attempt Was Being Made To Get 12th Juror and Two Alternates From a Special Panel Of 25—Some Excused Had Been Ill—Farmer Said He Had "Never Sat That Long."

ZIETZ-FOSTER MURDER JURY

No. 1—Alvin B. Worthington, foreman, New Hope, auto dealer.
No. 2—George S. Havens, New Hope, farmer.
No. 3—Mrs. Mildred M. Holbert, Warrington, housewife.
No. 4—C. Raymond Dager, Forest Grove, farmer.
No. 5—Mrs. Augusta Gill, Bristol, housewife.
No. 6—Mrs. Catherine W. Danser, Yardley, housewife.
No. 7—John M. Hemphill, Hatfield RD, farmer.
No. 8—Mrs. Marion S. Burton, Bristol, housewife.
No. 9—Elmer F. Smith, Quakertown, retired.
No. 10—Robert E. Billger, Quakertown, athletic field custodian.
No. 11—Clifford W. Wright, 41, Newtown, woodworker.
No. 12—Amos Haigh, Quakertown, RD, carpenter.



Relator's Exhibit No. 62

The third panel of jurors—25 in number—reported for duty in criminal court this morning for *the Zietz-Foster murder case.*

For the second night Sheriff H. Raymond Ahlum and deputies were kept busy searching for jurors who might be willing to serve in the present trial if accepted.

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RELATOR'S EXHIBIT NO. 62.

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128 Jurors Called in Trial

(Continued From First Page)

Gall bladder trouble, heart ailments, disbelief in the death penalty, fixed opinions, business relations with attorneys in the case, children at home, operations, advanced age, religious scruples and a dozen other reasons have so far been advanced by the prospective jurors who have been challenged or excused.

Relator's Exhibit No. 62

At least two war veterans examined as jurors said they were opposed to the death penalty. Another juror said he had been against capital punishment since a boy; another since he started to vote; and still another, since the Lindbergh trial.

An ice cream store owner examined as a juror, said that he would "hate to see his wife alone over the Memorial Day season in that busy store." He was excused.

The fourth day of the trial opened this morning shortly after 10 o'clock and still the case had not been opened to the jury by the Commonwealth. No. 12 juror and two alternates were yet to be selected when court opened this morning.

Eight jurors were selected Monday and Tuesday and three yesterday.

The last juror examined yesterday afternoon before adjournment and the exhaustion of the second panel was J. Roland Leatherman, Doylestown clothing store salesman, who was challenged for cause after informing the court that he had a "fixed opinion" about the case, that he was quite sure could not be changed.

About 15 minutes before the last juror had been called Judge Calvin S. Boyer directed that the third venire be prepared.

When the case is opened two Philadelphians, Harry Zietz, 18, and Harold Foster, 22, will go on trial for the murder of William Kelly, 38, well known resident of Trevose. Kelly was shot while standing outside the Feasterville Inn, on the night of December 22. The Commonwealth alleges that Zietz is the trigger-man in the case.

A total of 128 jurors had been examined when court adjourned yesterday from which 11 had been accepted.

Relator's Exhibit No. 62

No. 12. Almost!

A twelfth juror was actually seated yesterday afternoon, but not for long.

She was Miss Marie Lechien, 49, a registered nurse living in Sellersville. As the 101st juror examined, Miss Lechien said, she had no conscientious scruples against capital punishment, and was passed by the Commonwealth. The defendant Foster passed the juror and so did Zietz—and Miss Lechien was seated in No. 12 chair.

Court then recessed for 10 minutes before starting on the alternate hunt. During that recess the court was informed that Miss Lechien had recently undergone an operation and that she might not be physically able to stand a long trial.

When the jurors returned to their chairs, Judge Boyer questioned Miss Lechien about her physical condition. The nurse informed the court that she had recovered sufficiently she was quite certain.

Miss Lechien said that she could sit for an hour at a time she was sure. The court informed the juror that it would be necessary to sit for longer periods of time than that during the trial. The juror informed the court that she had an air cushion with her and was certain she would be okay.

Judge Boyer, upon agreement of counsel on both sides, took no chances and excused Miss Lechien. That left No. 12 vacant again, and examination of jurors continued.

Robert E. Billger, 56, custodian of the Quakertown High Athletic Field, was selected as No. 10 juror.

The No. 11 juror—Clifford W. Wright, 41, a woodworker, was accepted Wednesday afternoon at 2 p.m. His home is in Newtown.

Relator's Exhibit No. 62

"Never Sat That Long"

"I never sat that long." Morris Rotenberger, 42-year-old Trumbauersville farmer, answered Assistant District Attorney Williard S. Curtin in answer to a question: "Is your health such that it might be affected by being detained here for several days in the trial of this case?" The juror was challenged peremptorily by defendant Foster.

"Here is certainly an industrious man," commented the Court.

Ex-Eastern "Pen" Guard

William Wallace, 49, of 523 Swain St., Bristol, a dyeworker and former guard at the Eastern State Penitentiary, informed the court that he had been in poor health. He was excused.

"Second-Panel" Challenges

Others challenged for cause in the 2d panel were: Nathan Wiser, Jr., Dublin; Charles E. Walp, Quakertown; Ray Z. Hartman, Quakertown; Stanley A. Styer, Perkasie, business reasons; Mrs. Minnie Mitman, Perkasie, R.D., business reasons; Raymond C. Jones, Bristol; George Melvin Keyser, Sellersville; John Edge, Quakertown; Warren Rosenberger, Doylestown; Ardie W. Snyder, Jr., Quakertown; Morris Savidge, Newtown; Elmer Yoder, Quakertown; George F. Kooker, Quakertown.

Others charged peremptorily in the 2d panel were: Fred Bebbington, Yardley; Charles L. Headman, Quakertown RD 1; LeRoy E. Dixon, Trumbauersville; Albert A. Bliss, Jr., Doylestown; Raymond B. Geiger, Milford Square; Wil-

lard R. Nase, Trumbauersville; Morris Rotenberger, Trumbauersville; Oliver A. Jarrett, Quakertown; Jacob F. Crouthamel, Plumsteadville; Walter Wasuirka, Bristol; Michael Riola, Bristol; Walter Derstine, Sellersville; William McCahan, Bristol; Clinton R. Greenlee, Newtown.

Thursday Morning

Mrs. Margaret H. Gaine, of Newtown, the first juror called in the third panel this morning was excused because of ill health.

Merton Meck, Quakertown cab driver; Harold Moyer, Perkasie, were also eliminated, the latter being related to counsel in the case. Howard H. Weirback, Quakertown, was next challenged.

Mrs. Arline P. Jenkins, 27-year-old Quakertown housewife, and mother of a 3-year-old child, who is studying hair-dressing, was accepted by the defense, but challenged peremptorily by the State.

Amos Haigh, 66 year old carpenter living in Quakertown R.D. and the 136th juror examined since the trial got under way, was accepted as the No. 12 juror by both sides at 11:40 this morning. Haigh said he had no objection to the death penalty.

(Italics supplied).

Relator's Exhibit No. 63

RELATOR'S EXHIBIT NO. 63.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 28, 1948.

(Page 1).

Jurors Visit Murder Scene, Testimony Is Underway: Landlord Identifies Three

John R. Naysmith was on the witness stand this morning at the opening of the fifth day of the *trial of two members of a Philadelphia boy-bandit gang that killed a Trevoseman, made a cripple out of another man for life, and injured several others in a holdup at the Feasterville Inn last December 22.*

Naysmith is the proprietor of the *Feasterville tavern where the holdup took place.* He was behind the bar the night that some eighteen patrons were looking at television when *four youthful bandits*, including Harry Zietz, 18, and Harold Foster, 23, *started shooting after holding up the customers and the tavern till.*

Jury Visits Scene

It took three and one-half days to draw the jury of four women, eight men and two alternates. District Attorney Edward G. Biester opened to the jury last night at 5 o'clock,

Relator's Exhibit No. 63

after the jury had visited the scene of the crime at Feasterville.

District Attorney Biester briefly summed up the highlights of the prosecution in his opening address to the jury. *He left little doubt in the minds of those who heard him that when he makes his next speech to the jury the Commonwealth will ask for the death penalty.*

"We will show you that Zietz fired two shots in the air after holding up the inn and that one of them hit Kelly", Mr. Biester said. He also described the shooting inside the tavern where one man was rendered a cripple for life.

"After we produce all our testimony and there will be a great deal of it", Mr. Biester continued, "I will have something else to say to you. At that time we shall argue to you what should be done with the defendants."

The crippled man who was one of the victims of the Feasterville holdup will be a Commonwealth witness.

Zietz and Foster are charged with the killing of William Kelly, 38, of Trevose, who died in the Abington Memorial Hospital, two days after the pre-Christmas shooting. Kelly was a highly-respected citizen of his home community and was employed by a contractor.

Alternate Jurors

The two alternates selected yesterday afternoon are Bruno Bobiak, 60-year-old Richlandtown farmer, and Francis E. Rantz, 65-year-old investigator for the Federal Bureau of Labor Statistics, living in Quakertown.

With the completion of the jury, the motion filed by District Attorney Biester that the jury be taken to the

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Relator's Exhibit No. 64

RELATOR'S EXHIBIT NO. 64

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Jurors Visit Murder Scene

(Continued from First Page)

scene of the crime, was allowed. Judge Boyer accompanied the jurors.

Defense attorneys, I. Louis Rubin for Zietz; Donald B. Smith and C. William Freed, Jr., for Foster, asked the court that the defendants be allowed to view the scene of the crime because the Feasterville Inn had undergone alterations since the holdup and shooting. Judge Boyer denied the motion for the time being, but said that, if the trip could be arranged for the defendants to view the scene without delaying the trial, the motion might be granted.

It took exactly 147 jurors to get the 14 required for this trial. It took 17 hours of questioning. It will take night court sessions to get through in reasonable time, which some consider another week. There was a session of court last

Relator's Exhibit No. 64

night, may be one tonight, and there will be court Saturday morning.

The jurors will be given a holiday Sunday and Monday, but a holiday under the careful surveillance of tipstaves and court officers. *A bus trip has been planned for the jurors on Memorial Day.* Then back to the grind next Tuesday morning at 9:30.

The jury was sworn in at 2:15 yesterday afternoon. Court recessed until 5, then the D. A.'s opening and another recess until 7:30 p. m.

First Witness

The first witness called last night was William S. Erwin, a registered engineer living in Langhorne. He identified and described a number of drawings of the scene of the crime and the surroundings. Marion E. Whipps, Bristol photographer, likewise, identified photographs of the inn where the shooting took place.

In the court room last night were Foster's mother and father and his brother. They were seated about 50 feet from the two defendants, where they listened attentively as one of the Commonwealth's main witnesses took the stand. He was John R. Naysmith, 34, who testified partially last night and then took the stand again this morning.

Naysmith identified the photographs of his Feasterville tavern as displayed by a previous witness. He said that he was in the taproom from 6 p. m. the night of December 22, and that patrons, about 18, were in the bar room and shuffleboard room adjoining.

"*I saw Zietz and Foster in front of the bar*", Naysmith said. "*I also saw David Darcy there.*"

David Darcy, 22, and Felix Capone, 16, are the other two youths charged with the Kelly murder. They will be tried at a later date.

Relator's Exhibit No. 64

Holdup Described

"I was serving beer in the bar; I turned about and saw Foster with a gun in his right hand pointing at me . . . he was standing near the cash register and said, 'get'em up: this is a stickup'.

"Foster went out to the kitchen and brought my wife in and stood her beside me.

"Then eight or ten shots were fired in the bar-room. Foster then turned to Zietz and asked him to keep two others covered, and then Foster went to the cash register and took out the money.

Crippled For Life

"I heard Foster demand all patrons to put their wallets on the bar. I saw Alan ("Reds") Hellerman lying on the bar-room floor; he had been shot".

Hellerman was crippled for life. He will be a witness for Commonwealth. Hellerman, 45, lives at 3453 Palmetto st., Phila.

Second Man Shot

Another man shot is Edward Wunsch, 25, Buck rd., Feasterville.

Naysmith continued his testimony:

"I heard Miss Winnie Wiley, 32, 8300 Verree rd., a friend of Hellerman, run to his side.

"Miss Wiley said, 'Oh, Reds!! What have they done to you?'

"'Don't bother lady', Foster said, 'He's dead'."

Relator's Exhibit No. 64

Naysmith said that Zietz and Darcy also had guns in their hands.

"Foster asked me for my wallet and I handed it over" Naysmith continued, "Foster opened the wallet and then said, 'What! Only a lousy deuce'." Then they took watches from some of the patrons. Darcy took the watches.

"Zietz, with his gun had the customers lined up against the wall.

"Then I heard one bandit say, "Let's get the hell out of here'. Foster looked over the bar first and took a bottle of whiskey off the bar, and jumped over the bar with whiskey in one hand and a revolver on the bar. *Then Foster kicked Hellerman, who was lying on the floor, and said, 'He ain't dead yet, he's breathing'.*

"Then *Darcy* fired two shots at the telephone mouthpiece.

"Foster said, "I don't want you to move for some minutes', and, as he went out the door, said, 'I wish you all a very, very Merry Christmas'. Then the three defendants left the place.

"Everybody stood still for a time and then somebody went outside to Buck Hotel to call for an ambulance. The telephone was not working.

"The Bucks County Rescue Squad took Hellerman to the hospital.

"There was $78 taken out of my cash register.

"I heard *Darcy* ask where the hero was that hit me. He also said, 'Where are the police; I feel like shooting a couple of them'."

The State called for cross-examination at this point.

Relator's Exhibit No. 64

Cross-Examination

Attorney Smith, for Foster, cross-examined Naysmith first.

"I heard shots fired but didn't see who fired all of them. I saw Foster fire but two shots, and I didn't see Hellerman fall."

The witness said that Zietz took no part in emptying the wallets. The defense attorneys finished their cross-examination of Naysmith at this point.

Mrs. Naysmith Testifies.

Mrs. Florence Naysmith, wife of the tavern proprietor, testified she was in the kitchen and that Foster came out, pointed a gun at her and ordered her out to the bar room with her husband.

"I heard more than six shots fired", Mrs. Naysmith testified. "Foster fired two shots in the direction of the door. Then I saw Edward Wunsch fall to the floor.

"I saw blood running out of Hellerman's neck . . . He was on the floor."

(Italics supplied)

Relator's Exhibit No. 65

RELATOR'S EXHIBIT NO. 65.

DOYLESTOWN DAILY INTELLIGENCER,
MAY 29, 1948.

(Page 1).

HEARD FEASTERVILLE BANDITS Say They Would Also Like to Have Shot Some Cops

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The horror of Feasterville's tavern-murder during last year's Christmas season, when an innocent outsider was fatally shot, is being related in detail again today in Bucks county criminal court.

The spectacle of a quartet of wise-cracking trigger-happy young bandits who invaded the Feasterville Inn last Dec. 22 at night, shooting down patrons "just for the fun of it," was described from the mouths of numerous Commonwealth witnesses all day yesterday.

They testified in the murder trial of Harold Foster, 23, and Harry Zietz, 18, both of Phila., of the hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later.

The sixth day of the trial got under way this morning

Relator's Exhibit No. 65

Court adjourned at noon today until next Tuesday morning. The jurors will remain together.

Eddie Wuensch Testifies

One of the leading Commonwealth witnesses Eddie Wuensch, 26-year-old Feasterville sheet metal worker, took the witness stand this morning.

Wuensch said he was in the shuffleboard room at the tavern, *when David Darcy, one of the bandits yet to be tried, came in and fired two shots.*

"I was scuffling with Darcy and all of a sudden I felt something hot in my right arm and left shoulder." Wuensch testified. "Lots of shots were being fired. I was later taken to the hospital.

"They left me come home for Christmas, but I had to go back to the hospital for an operation after Christmas; but the operation was not successful in removing one the slugs in my shoulder.

"Before I was shot I saw neither Zietz nor Foster—they were in the adjoining barroom."

The witness Wuensch testified that after an operation on his back he had to take a six weeks' rest,

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Relator's Exhibit No. 66

RELATOR'S EXHIBIT NO. 66.

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HEARD BANDITS SAY

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and that pains in his back constantly prevent him from doing the type of work he has been doing.

Another witness this morning was Howard Polmateer, of Holland, a patron the night of the holdup, who described what he saw.

The defense attorneys asked no questions of the witnesses Wuensch and Polmateer.

Frank Fronsdale, 45, of Feasterville, a painter, testified he was in the tavern with George Roth and saw Zietz and Foster at the bar.

"I saw Foster jump over the bar, pull a gun and declare it was a stickup—he had a gun in his hand and he swung it toward the bartender.

"I heard 2 shots from the shuffleboard room. Then a fist fight started, and more shooting started. I saw Darcy shoot

Eddie Wuensch. Zietz, too, shot at Wuensch. Zietz fired 2 shots that I saw. Other shots were fired from the back of the bar.

"I saw *Darcy* fire two shots into the telephone mouthpiece, and heard *one of the three holdup men* say he wished some cops would come in so he could shoot them up."

James Brown Testifies

James Brown, 67, of Feasterville, owner of the building where the holdup occurred, and an uncle of John R. Naysmith, the proprietor, testified that he "put his hands up, the same as the others did", after he had served a beer to Foster.

"Foster pointed a gun at me as well as the rest of the people," Brown testified. "Hellerman and *Darcy* were scuffling in the bar. I saw Foster take deliberate aim and fire 2 shots in direction of Hellerman and *Darcy*.

"I saw at least 3 shots fired by Zietz's gun in the same direction, and I saw Hellerman fall. Edward Wunsch was also in the scuffle. Zietz shot 3 times in succession before Foster fired."

Brown testified that he saw Kelly lying on the ground outside the tavern after the holdup.

Very few questions were asked in cross-examination.

"After Foster fired his gun, Hellerman fell to the floor," Brown testified. "I could not tell which shots hit Hellerman."

Other Holdup Witnesses

Mrs. Gertrude Raistrick, 43, of Feasterville, testified that she and her husband were in the tavern looking at tele-

vised fights on the night of Dec. 22 between 10 and 11 P. M. Virginia Stickel also accompanied the Raistricks.

"I saw Zietz shoot Eddie Wunsch and *I saw Darcy fire shoots too*", the witness said. "When Foster fired, I had to dodge or I'd have gotten it," Mrs. Raistrick added. The latter part of this testimony was ruled out.

"Zietz fired first", Mrs. Raistrick continued.

"Then Foster fired two shots that I saw, and Hellerman fell and I fell too. *I saw Darcy reload his gun in front of me.*"

Mrs. Raistrick said that Foster looked at her wedding ring and said, "Oh, you're married, we don't want that ring."

Harrison Raistrick, 53, husband of the previous witness, corroborated his wife's testimony. He said he saw Zietz fire directly at Eddie Wunsch.

"I can account for about 10 shots fired inside the tavern," Harrison Raistrick testified. "I put $8.03 on the bar. Foster was taking money out of the wallets, putting it in his pocket. Zietz was at the door with a gun covering the patrons.

"Zietz picked up Hellerman's hat and put it on his head, and said, 'You won't need that where you're going'. Hellerman had been shot and was lying on the floor, in a bleeding condition.

"I knew the victim Kelly for about 16 years. I saw him laid out at the funeral parlor."

Another Eye Witness

Virginia Stickel, of Feasterville, another patron at the tavern, testified "they were all waving guns at us."

"I don't know which defendant it was, but one of them came back in the barroom, looked at the Christmas lights and wished us all a very Merry Christmas," Miss Stickel testified. "I couldn't tell where the shots came from; they were all shootin'."

George Roth Testifies

George Roth, Myrtle ave., Feasterville, testified that he went to the Feasterville Inn with a friend, Frank Frosndale to see the television.

"Darcy came over to me, put a gun in my side and said, "This is a stickup", Roth testified.

"Eddie Wunsch was punching *Darcy* and *Darcy* was shooting at Wunsch. *Darcy fired 4 shots in quick succession.* Zietz fired at least 3 shots at Wunsch and at Hellerman.

"*Darcy* and Zietz then opened and reloaded their guns. I would approximate that 11 or 12 shots were fired in the barroom."

Elmer Woldeck, a Poquessing ave. gas station attendant, was in the tavern with his boss the night of the holdup. He testified that 10 or 12 shots were fired.

The Commonwealth's eleventh witness was *Maurice Phillips*, 35, Poquessing ave., Somerton, employer of the witness Woldeck, who gave corroborative testimony as to the holdup.

(Italics supplied)

Relator's Exhibit No. 67

RELATOR'S EXHIBIT NO. 67.

DOYLESTOWN DAILY INTELLIGENCER.
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(Page 1).

"Why Did They Shoot Me?" Murdered Man Asks After He Was Victim in Feasterville Shooting

---

Crippled for life, a 46-year-old Philadelphian, was wheeled into court this morning on an invalid chair.

From his station next to the witness stand, Alan Hellerman, the invalid witness, pointed his finger of identification at the two accused defendants in the murder trial of Harry Zietz, 18, and Harold Foster, 23, charged with the pre-Christmas slaying of William Kelly, 38, of Trevose, on the night of Dec. 22, outside the Feasterville Inn.

This is the seventh day of the trial before a jury of 4 women and 8 men in Judge Calvin S. Boyer's Court.

Hellerman was playing shuffleboard in a side room of the inn *when David Darcy, 22—who will be tried later—came in and fired two shots.*

"I scuffled with Darcy, Hellerman testified, "and then Zietz put his gun over Darcy's shoulder and fired at me

Relator's Exhibit No. 67

The bullet hit me in the neck and I fell to the floor. Then I heard one of bandits say, 'Hell, he's not dead yet, he's still breathing.'

"I was conscious all the time I was on the floor. Foster kicked me before they left the place. I think Foster was the last man out.

"I was removed by Bucks County Rescue Squad to the Nazareth Hospital and transferred to Temple Hospital where I remained 4 months. I have been home 4 weeks.

"I have pain all of the time in my legs. I no longer have normal control of my organs. I can move my hands but not my legs."

No Questions

No questions were asked by the defense attorneys. Hellerman was questioned for 30 minutes by District Attorney Edward G. Biester.

Hellerman was accompanied this morning by Mrs. Winnie Lewtwyler, of Fox Chase, who was at the Feasterville Inn with him the night of the holdup.

Horace Patterson, of Feasterville Pike, a mail clerk, was called as the 18th Commonwealth witness this morning. He was standing with the victim Kelly, together with a friend, Frank Walter *when Kelly*.

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Relator's Exhibit No. 68

RELATOR'S EXHIBIT NO. 68.

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"Why Did They Shoot Me?"

(Continued from First Page)

was shot as the fleeing bandits left the Feasterville Inn.

Woman Testifies

Testimony late Saturday morning was given by *Mrs. Winnie Lewtwyler*, of Fox Chase, who stated that she had been playing shuffleboard and had left the tavern after trouble started. She said that she saw William Kelly, the murdered man, outside the building.

Mrs. Lewtwyler said that when she learned that a holdup was under way she ran to the Buck Hotel and told the proprietor to call police.

Frank Walter Testifies

Frank Walter, 29, of Feasterville, a friend of the victim Kelly, stated that he saw Kelly at 11 p.m. at the Buck Hotel

on the night of the holdup, and was talking to him for some time.

"About 11.25 Mrs. Lewtwyler rushed into the hotel and said there was a shooting at the Feasterville Inn", Walter testified. "She was hysterical and ran.

"Kelly and I went down the road and were standing at an intersection near the Feasterville Inn, talking about the reported holdup. Right then we were not certain about there being a holdup.

"There was an automobile parked in front of the Feasterville Inn, with the front grille of the car pushed in.

"One of the men got in behind the driver's seat of the car and the other man got in the other side, in front. The car remained there a minute and the lights were turned on and off, only one light worked. The motor of the car was running.

Describes Shooting

"Then the car started up the Newtown road. As the car passed us I noticed two sharp flashes from the driver's window, two orange-like flashes, and a noise like a revolver shot.

"Kelly fell to the ground.

"We were not over 10 to 20 feet away from the car when the shots were fired. Kelly was bleeding from the back of his head. Patterson ran to get help and the *bandit car* continued on.

"Kelly was not conscious after he fell, but he did regain consciousness a few minutes later and said: 'Who were they? Why did they shoot me? Look! I'm paralyzed'.

"Then we took Kelly to the Abington Memorial Hospital. I next saw Kelly in the hospital on Christmas Day. And he was dead."

Relator's Exhibit No. 70

Under cross-examination by Attorney Donald Smith, Walter said he did not see any other men in the *bandit car.*

Patterson described the shooting of Kelly vividly. He told the court and jury that the shot that felled Kelly was fired from the driver's seat of the *bandit auto.*

(Italics supplied)

RELATOR'S EXHIBIT NO. 70.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 2, 1948.

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Zietz Admits Firing Two Shots Out of Auto

Kelly Murdered Man, Hit By Two Bullets From Car

Persons In Feasterville Inn, Besides Those Shot, Had Narrow Escape, They Testified—Two Witnesses Said They Did Not Think The Defendants Were Intoxicated

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"You ought to try this some time . . . it's a lot of fun," a 16-year-old Philadelphia boy-bandit, remarked to patrons

Relator's Exhibit No. 70

of Deacon's Inn near Penndel during a pre-Christmas holdup last December, less than 30 minutes after a hold-up and murder at nearby Feasterville.

The trigger-happy bandit was Felix Capone, the youngest of four Philadelphians charged with the murder of William Kelly, 38, of Trevose. The others are Harry Zietz, 18, and Harold Foster, 23, now on trial before a jury of four women and eight men in Judge Calvin S. Boyer's court, *and David Darcy, 22, who will be tried later.*

The statement made by young Capone during the Deacon's Inn holdup was related yesterday during testimony offered by Joseph Gersch, 24, a Penndel farmer who was at the inn when the holdup took place.

The eighth day of the trial got under way this morning, after a session of night court last evening that was attended by several hundred spectators.

Slowly, but carefully, the Commonwealth is leading up to the point when it will ask that the jury demand that Zietz and Foster pay with their lives for the death of William Kelly.

During most of the testimony up until the present time the defense attorneys, C. William Freed, Jr., Donald Smith and I. Louis Rubin, have asked very few questions in cross-examination. District Attorney Edward G. Biester and his associate, Willard S. Curtin, have thoroughly examined every witness. Highlighting last night's testimony was that given by Lieut. John J. Hanlon, of the Philadelphia

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Relator's Exhibit No. 71

RELATOR'S EXHIBIT NO. 71.

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Zietz Admits Firing 2 Shots

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Detective Division, who interviewed the defendants after their arrest in Philadelphia, and received from them an oral and a written statement.

The written statement will be offered in evidence today.

"They admitted to us that they were responsible for the Feasterville and Penndel holdups", Hanlon testified.

"Harry Zietz told us that the four of them left Philadelphia on December 22 about 11 p.m. and came to Feasterville Inn. They told us that Capone remained in the car and the others went inside the inn. Zietz said they got some beer first and then Foster 'took' the cash register and declared a holdup.

"Zietz told me that he fired two shots over the head of *Darcy*, at two men who were scuffling in the center of the floor; that when they left, *Darcy* and Zietz got in the car first and Foster then followed.

Relator's Exhibit No. 71

"Zietz told me orally that he fired two shots out of the automobile car window as they left the Feasterville Inn, and that he didn't know what happened, but that they then drove to Deacon's Inn and held up that place."

"D. A." Reads Statement

Assistant District Attorney Curtin then read the statement to the jury, an 8-page, typewritten document.

Excerpts from statement:

"Zietz drove the car, it was his . . . Foster had a 32-20 foreign make gun in the Feasterville Inn . . . I had a 32 caliber gun . . . I fired several shots.

"Harry Zietz drove the car . . . As I pulled away, I fired 2 shots (Zietz talking) . . . I fired the shots because someone said that someone was coming out of the inn . . . The ammunition was bought by Zietz in a Phila. sporting goods store . . . The guns used in the holdups were our own . . . *All four defendants said everything in the statement was true* . . . The statement was read to Capone who cannot read."

Tuesday Testimony

Mrs. Elizabeth L. Hogeland, who lives near the Feasterville Inn, testified that one of the bullets fired from the automobile went through a window in her house and struck a stone wall inside, and ricocheted to a door.

Medical Testimony

Dr. Charles F. Laycock, resident in surgery at Abington Memorial Hospital, testified that he treated Kelly in the

receiving ward and that the victim had two wounds in the right temple area.

Dr. Laycock described the operation performed on Kelly and said that Kelly died the night of Dec. 24, Christmas Eve. Kelly's skull was fractured, the witness said.

Dr. Smith Foushee, interne at Abington Hospital, corroborated Dr. Laycock's testimony.

Coroner's Physician Testifies

Dr. John C. Simpson, 920 Swede st., Norristown, coroner's physican of Montgomery county:

"I performed an autopsy on Kelly's body on Christmas Day, 1947", Dr. Simpson testified.

Cause of Kelly's Death

The direct cause of death was a hemorrhage caused by a fractured skull, the coroner's physician testified.

Deacon's Inn Holdup

Joseph Gersch, 24, a farmer living near Penndel.

"I was at Deacon's Inn about 11:45 p.m. the night of Dec: 22" Gersch testified.

"Four of us were playing shuffleboard when three fellows came in.

"*Just about 12 midnight, Zietz, Foster and Darcy came in together.* I looked up and saw Foster behind the bar.

"Then I saw *Darcy* with a gun and pointing it at the proprietor and said 'this is a stickup', and ordered us to take out our wallets and money, Zietz was standing nearby *Darcy* took money and put it in pocket.

Relator's Exhibit No. 71

"Then Felix Capone came in (a 4th one accused of the same crime). *Darcy* gave Capone his gun.

"Capone said to us (he is 16); 'you ought to try this sometime; it's fun'. One of the fellows was playing the piano. Zietz then fired a couple of shots in the barroom ceiling as they left. One shot just missed a Mrs. Valeria Lachenman, who was inside.

"When *Darcy* came in the barroom he told us that he had just shot shot a couple of men at another place.

"They robbed us of our money and watches."

Defense Attorney I Louis Rubin for Zietz, objected to Checchias' testimony as being merely of an accumulative nature, and asked it stricken from the record.

Judge Boyer overruled the motion and further stated that *any testimony as to the second holdup would tend to weigh details as to the extent of the punishment in this case.*

Bandits Not Drunk

On cross-examination by defense Attorney Bubin, Checchia stated in his opinion the defendants were not drunk.

Officer Bowman Testifies

Patrolman William Bowman of the 27th District, Phila., testified that he spied the *bandit car* and stopped it at Frankford ave., and Friendship st. Patrolman Steven Melnic was with him.

Patrolman Bowman identified all guns, stolen watches and other things found in the Plymouth 2-door sedan.

The *bandit car* that was stopped at 1.17 A.M. Dec. 23, belonged to the defendant zietaz, Bowman testified. The witness said none of the defendants appeared intoxicated.

Relator's Exhibit No. 71

Deacon Inn Patron

Angelo Spadeccino, 25, Woodbourne, testified that he arrived at Deacon's Inn at 11 P.M. on Dec. 22.

"I saw Foster and Zietz at Deacon's Inn," Spadeccino testified. "I was playing shuffleboard with friends, and I first saw defendants—*Foster, Zietz and Darcy*—shortly after midnight.

"*Darcy* said 'off with your watch. Don't try and get funny, we just shot three fellows down the road.' *Darcy* played the piano. Foster ripped the telephone off the wall. Then Capone took over. A shot was fired in the direction of Mr. and Mrs. Fred W. Lachenman, by Foster.

Hellerman's Operation

Dr. Michael Scott, of the surgical staff of Temple University, testified that he performed an operation on Alan Hellerman, who was before court in a wheeling chair earlier on Tuesday. He removed the bullet from Hellerman's spine and placed it in a test tube which was presented in evidence.

(Italics supplied)

Relator's Exhibit No. 72

RELATOR'S EXHIBIT NO. 72.

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Prosecutor's Plea

"*Morally these boys, Zietz and Foster, killed three men* the night of the Feasterville holdup", District Attorney Edward G. Biester, in his summation to the jury declared this morning.

"William Kelly was mortally wounded by a shot from the bandit gun, and the two others were horribly crippled, one for life", Mr. Biester continued. "Even a surgeon's knife cannot restore one of the victims to normal life."

The District Attorney also emphasized the fact that the *defendants' callousness* was outrageous when *the bandits* wished the victims of a holdup, "a Merry Christmas" before leaving the Feasterville Inn shooting escapade.

"Not satisfied with the Feasterville affair, they went to another place the same night and held it up with guns. What one did, was the attitude of all".

(Italics supplied)

Relator's Exhibit No. 72

RELATOR'S EXHIBIT NO. 72.

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Defense in Murder Trial Decides Not to Offer Evidence

Feasterville Bandits May Know Their Fate Late Today

"NO, YOUR HONOR", IS RESPONSE OF DEFENDANTS WHEN COURT ASKS IF THEY WISH TO TESTIFY

—Zeitz's Revolver is Identified as the One Which Fired the Fatal Bullets, Expert Testifies

Whether they must pay for their sensational 30-day crime spree that ended in a murder, by going to the electric chair or by serving life imprisonment, or less, will probably be known late today by two Philadelphia youths on trial for the slaying of William Kelly, 38, of Trevose, last December.

Relator's Exhibit No. 72

The trial rapidly approached an end this morning at the opening of the ninth day, when the defense announced that no evidence would be presented in behalf of Harry Zietz, 18, and Harold Foster, 23, the co-defendants charged with murder.

The Commonwealth rested yesterday afternoon at 4:55 and court opened at 9:30 this morning.

After the announcement had been made by Attorney Donald B. Smith, for Foster, and by Attorney I, Louis Rubin, for Zietz—that no evidence would be presented in their behalf—court took a recess until 10:30 this morning in order to give District Attorney Edward G. Biester time to confer with his associate before he opened to the jury first with his summation of the case for the Commonwealth.

As a matter of record, Judge Calvin S. Boyer, who is trying the case, asked both defendants separately whether they desired to testify, and both replied in a clear voice—"No, your honor".

Foster, who is said to be entitled to wear 14 battle stars, is a Navy veteran who fought in numerous major sea battles. Zietz served with the Army, but not during the war.

Under the present set-up, with no evidence offered by the defense, the District Attorney's summation, coming first, will be followed by the summation, by the defense attorneys. Then the District Attorney will be permitted to reply be-

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Relator's Exhibit No. 73

RELATOR'S EXHIBIT NO. 73.

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Defense in Murder Trial

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fore Judge Boyer gives his charge to the jury.

Judge Boyer said this morning that he would prefer to charge the jury Friday morning, but that he may charge this afternoon if the attorneys on both sides can complete their summations by noon.

Commonwealth Rests

The Commonwealth rested yesterday afternoon at 4:55 at the close of the eighth day of the trial, when District Attorney Edward G. Biester informed the court that there would be no more testimony for the prosecution for the time being. Court adjourned until 9:30 this morning.

Relator's Exhibit No. 73

Yesterday's testimony included the presentation of oral and written statements by the defendants.

Seven shootings, one a fatal affair, during a 30-day hold-up spree, were enumerated in court as the written documents were read by Assistant District Attorney Willard S. Curtin.

NINE HOLD-UPS

Seven persons were shot, one was murdered and nine places were held up by the four accused Philadelphians, according to the statements submitted in evidence in court yesterday, and signed by Zietz, Foster, Darcy and Capone.

In sequence the hold-ups were recorded as follows:

Hold-up of Ralph and Jim's Cafe, White Horse pike, *Waterford, N. J.*, on Nov. 30, 1947, when each bandit got about $18, and shots were fired in the floor.

Holdup of Old Coin Inn, White Horse pike, *Hammonton, N. J.*, on Dec. 3, 1947, when about $586 was stolen, with all bandits armed.

Holdup the same night, Dec. 3, 1947, at *Mary's Tavern, Maple Shade, N. J.*, when over $100 was taken from patrons and the cash register, but no shots fired.

Holdup at *Bell's Tavern*, 8300 Bustleton Pike, *Phila.*, December 6, when three people were shot, including a Philadelphia city fireman, who was badly crippled. Money stolen from patrons, and bandits escaped through a broken window.

Holdup at Poplar's Inn, Lincoln Highway, opposite the *Langhorne Speedway*, on December 9, when between $30 and $40 was stolen in addition to some liquor.

Holdup at Wolf's Tap Room, December 13, at *Elkin's Park*, Montgomery county, when $60 apiece was divided and one man was shot. In this holdup *Darcy sang through the radio*

microphone for the patrons before a holdup order was announced.

Holdup at a cafe at *Woodlyn*, Ridley Park township, Delaware county, on Dec. 17, 1947, when $122 in cash was stolen from the cash register in addition to a diamond ring and other jewelry from patrons.

Then followed the *two holdups and the murder of Kelly and the shooting of two others at the Feasterville Inn and Deacon's Inn, at Penndel on the night of December 22.*

Ballistic Expert

Lieut. George R. Spangler, of Phila., head of the ballistic laboratory of the Philadelphia police department, and one of the outstanding authorities in this country on firearms, was called as the last Commonwealth witness yesterday.

His last testimony was an opinion expressed in which Lieut. Spangler testified that a bullet taken from the body of the victim, William Kelly, who died on Christmas Eve last year, was a 32 caliber type bullet. It had previously been testified that Zietz used the type revolver that fired a bullet of that caliber the night Kelly was shot.

The witness also testified that one of the guns used by the bandits was a U. S. Army weapon with the initials filed off.

Previously, Lieut. John J. Hanlon, of the Philadelphia Detective Bureau, who together with Chief County Detective Anthony Russo, obtained many of the written statements, and had identified the weapons used by the bandits.

The revolvers used by the accused included the 32-caliber, a 38-caliber and an 8-millimeter French trench revolver.

Relator's Exhibit No. 73

Trooper Keith Dane, of the Langhorne sub-station of State Police, and prosecutor in the case, yesterday identified 12 spent bullets that were found in the Feasterville Inn after the shooting, and one on a window sill in the home of Mrs. Elizabeth Hogeland, across the street from the inn. The bullet found in the Hogeland home is believed to be one of two fired by Zietz as he fled from the inn—one of which hit Kelly.

The Court's Ruling.

In admitting the signed statements of other holdups than those at Feasterville and Penndel—to which the defense attorneys, objected—Judge Boyer stated that the statements would be admitted only for the purpose of fixing a penalty in the case, if a verdict of guilty is found.

(Italics supplied).

Relator's Exhibit No. 75

RELATOR'S EXHIBIT NO. 75.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 4, 1948.

(Page 1).

Fate of Zietz and Foster in Jury's Hands

Killing During Robbery in First Degree Murder

Judge Boyer Informs Jury During His Charge This Morning—Father is Advised to Leave Courtroom and Does So, But an Aunt Remains ——

The fate of *two "trigger happy" Philadelphia youths*, for whom the Commonwealth has asked the death penalty for the fatal shooting of a Trevose man three days before Christmas last year, is now in the hands of a jury of four women and eight men.

Judge Calvin S. Boyer charged the jury this morning for two hours at the opening of the tenth day of the trial which probably will be completed with a verdict some time this afternoon.

District Attorney Edward G. Biester and his associate have asked *that 23-year-old Harold Foster and 18-year-old*

Relator's Exhibit No. 75

Harry Zietz pay with their lives for the brutal killing of William Kelly, 38, outside the Fegsterville Inn.

This morning, Judge Boyer very explicitly outlined the law regarding murder in Pennsylvania, explaining in detail the difference between murder in the first degree and murder in the second degree. The charge of the learned jurist was clear and to the point.

Father Left Room

Before Judge Boyer opened his charge to the jury, and upon the advice of his attorney, Henry Zietz, father of one of the co-defendants, was advised to leave the courtroom and he complied with the order. His wife, who was stricken ill in court, was not present this morning. Mrs. Ethel Foster, mother of the other defendant, was also absent from court this morning. An aunt of Zietz remained in the courtroom to hear Judge Boyer's charge.

"We have now come to the part of this long trial where you have an extremely important duty to perform," Judge Boyer commented in his opening remarks. "You have been performing numerous duties, of course, since this trial opened, but now it is up to you to make a decision. The manner in which you have listened attentively indicates the intelligence that you possess as jurors."

Judge Boyer pointed out that the duties of the jury in this case pertain only to the father of the co-defendants, Zietz and Foster, and nothing to do with *two other defendants charged with the same crime (who will be tried later)—David Darcy, 22, and Felix Capone, 16.*

In outlining the law, Judge Boyer particularly emphasized that the

(Please turn to Page 8)

Relator's Exhibit No. 76

RELATOR'S EXHIBIT NO. 76

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Fate in Jury's Hands

(Continued From First Page)

Commonwealth in this case, contends that a murder was committed in the act of committing a robbery.

"That is murder in the first degree," Judge Boyer explained. "An unlawful killing in perpetration of a robbery, premeditated or not, is murder in the first degree."

Mother Stricken Ill

The grief-stricken mother of the defendant Zietz, collapsed in court Thursday afternoon just before her son's attorney, I. Louis Rubin, of Bristol, started his address to the jury. She is Mrs. Mae Zietz, 249 E. Baker st., Phila.

She was rushed to the Doylestown Emergency Hospital in an ambulance after Dr. Allen H. Moore was called to the courtroom. The extent of her illness has not been definitely determined, but she may have suffered a slight stroke from extreme shock and strain, Dr. Moore said.

Relator's Exhibit No. 76

A few minutes later, Mrs. Ethel Foster of 4032 Teasdale St., Phila., mother of the other defendant, also received medical aid from court attendants.

The two mothers and Zietz's father, have been in court throughout the testimony.

Mrs. Zietz was seated about 30 feet away from her son who was in prisoner's row, when she became ill. The accused Zietz jumped to his feet and tried to get to his mother's side, but was held back by State troopers.

Judge Boyer directed that the defendants be removed from the court room until the dramatics were over.

Asks Death Penalty

After that, Attorney Rubin summed up his case for his client Zietz. District Attorney Edward G. Biester had previously *asked that the jury impose the death penalty with a first degree murder verdict.*

Biester spoke first and was followed by Attorney Donald B. Smith for the defendant Foster, who was also represented by Attorney C. William Freed, Jr., of Quakertown. Their clients did not take the witness stand.

Attorney Rubin said in part: "It is true that Zietz and Foster were a *Jesse James couple.* The Commonwealth want to send these boys to their death. Zietz, I am certain is a victim of an unsettled age. I would certainly urge you that life imprisonment and not the death penalty would be proper in this case.

"The death penalty is a thing for hardened criminals.

"Can it be that the minds of these two boys are warped? They were not normal boys, with all the smart remarks they made on these hold-ups.

"If the State takes the lives of these boys what will be accomplished? They are not desperadoes; they are trigger-

Relator's Exhibit No: 76

happy kids, the victims of extreme juvenile delinquency and the times."

District Attorney Biester in his rebuttal remarks and the last speech to the jury before Judge Boyer's charge, answered the defense attorneys.

"It is true, this type of criminal don't shoot it out with the cops; they do their work against people who are unarmed", Biester said. "When arrested, they submitted to the police without a bit of argument. They were smart there; they knew that the cops had guns.

"Of course these boys are *not normal American boys*; no juror with common sense would believe that they are *abnormal boys.*

"But what is there in this entire case to warrant leniency?

"Yes, they are a sorry lot today, but they were as *brazen* as they could be during this trial and during their escapades of crime. There is nothing in the opinion of the Commonwealth that would justify anything less than the supreme penalty, which the Commonwealth is asking."

Another Case Monday

Next Monday morning, the murder trial of Dave Darcy, 22-year-old Philadelphian, charged with the same offense will get under way. He will be defended by Attorney Webster S. Achey, of Doylestown.

A verdict of first degree with life imprisonment in the Zietz and Foster cases may mean that Darcy would plead guilty. The death penalty would mean that Darcy will put up a fight to beat the electric chair.

Judge Boyer's charge to the jury was completed at 11:30 o'clock this morning, and *in his closing remarks, said in his opinion the death penalty is warranted in this case, but that it is up to the jury to decide.*

(Italics supplied).

Relator's Exhibit No. 77

RELATOR'S EXHIBIT NO. 77.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 4, 1948.

(Page 3).

We Noticed

So great is the public interest in the Zietz-Foster murder trial that an extremely large number of spectators crowded into the court room yesterday.

That a local housewife, *who hasn't missed a day of the murder trial in the Court House, here,* was glad it rained over Memorial Day holiday weekend so she could get her washing, ironing and other household chores performed.

(Italics supplied).

Relator's Exhibit No. 78

RELATOR'S EXHIBIT NO. 78.

DOYLESTOWN DAILY INTELLIGENCER,
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(Page 1).

Two Young Killers Turn to Bible for Comfort

Doomed to death in the electric chair, 23-year-old Harold Foster, and 18-year-old Harry Zeitz, are spending most of their time reading the Bible and on their knees praying.

They were convicted yesterday by a Bucks County jury of four women and eight men, *who wasted no time on their deliberation before returning a verdict of guilty of murder in the first degree with the death penalty recommended.*

In their separate cells in the Bucks County Prison this morning the two killers were sad looking youths. Foster more so than Zietz, is seeking consolation from the pages of the Bible. Foster has prayed almost constantly since he heard the lips of the jury foreman announce the verdict.

Zietz was more concerned about his mother's condition than his ultimate fate. His mother collapsed in court several days ago and had to receive hospital treatment.

Foster ate very little yesterday, but Zietz seemed to enjoy his meals, in spite of the fact that the *bravado he displayed during the trial is cracking fast.*

The two Philadelphians who were convicted of the murder of William Kelly, of Trevose, last

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Turn to Bible for Comfort

(Continued from First Page)

December 22, have little chance of a new trial; it is believed, although their attorneys went through the routine motions which will prolong the fixing of the date for the death penalty.

Three special guards have been assigned to the two killers by Prison Warden Earl D. Handy. No chances are being taken for Foster, especially, is very despondent.

Ten days were required to try the two boys. Fifty-two witnesses, not counting police officers, were examined by the Commonwealth. The defense produced no witnesses. *The amount of money paid out in costs to witnesses alone, not counting police, was $628, and this does not include the expense of the jury, their board and pay.*

DARCY'S TRIAL MONDAY

Next Monday morning, another jury panel will appear in court here when the murder trial of Davy Darcy, 22, will get under way. Darcy is charged also with the murder of William Kelly. His attorney will be Webster S. Achey, Doylestown.

(Italics supplied).

Relator's Exhibit No. 78

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(Page 1).

Held for Burglary

3 Youths Lived Near Zietz and Foster

Three Philadelphia youths living in the vicinity of an inn that was held up by the two convicted murderers, who were sentenced to death here, yesterday, was committed to the Bucks County Prison today on a charge of burglary.

They are Robert White, 18, of 8883 Bustleton Ave., George Johnston, 21, of 8390 Bustleton Ave., and Thomas K. Jones, 19, of 8917 Bustleton Ave.

They were arrested by Constable Isaac Watson, of Falls Township, *charged with breaking into a house in that vicinity and stealing a radio.* They were committed to the prison by Justice of the Peace Elwood Fritz, of Falls Township.

(Italics supplied).

Relator's Exhibit No. 78

RELATOR'S EXHIBIT NO. 78.

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JUNE 5, 1948.

(Page 1).

JUDGE BOYER PRAISES JURY FOR VERDICT CONDEMNING 2 KILLERS TO ELECTRIC CHAIR

Court Tells Eight Men and Four Women He Could Not See How Any Other Course Could Have Been Taken—Two Defendants Appear to Be Unmoved

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With the jury's death knell still resounding in their ears when a verdict of guilty of murder in the first degree, with the death penalty, had just been brought in, Harry Zietz, 18, and Harold Foster, 23, yesterday heard Judge Calvin S. Boyer, commend the eight men and four women for their excellent performance of their duties.

"I don't see how you could, under the evidence, have reached any other verdict," Judge Boyer said.

"Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the

Relator's Exhibit No. 78

seriousness of the folly in which so many young men indulge these days.

"The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision," Judge Boyer said.

Killers Unruffled

With the court room more than three-quarters filled and tension running high as it invariably does when a murder jury files in, the two defendants gave no indication of being upset. Both murderers wore their discharge emblems.

Harold Foster, dark and sharp-featured, stood up almost with a military bearing in order to hear the words, "Guilty with the death penalty" pronounced in his case first. He slumped noticeably into his chair, almost drooping, as the last of the 12 jurors repeated the terrifying phrase.

Harry Zietz, who looked each juror straight in the eye, glanced almost defiantly at Judge Boyer while the Court congratulated the jury.

State policemen who guarded the two defendants carefully while their fate was being decided and proclaimed in court, feel that the youths may have been prepared for the worst.

No comment was made by either youth, *but reddish-haired Zietz almost towed Cpl. Harold F. Dando out of the large court room, so anxious was he to get out-of-doors and into the car which transported him back to prison.*

An aunt and a brother of Foster sat silently and externally unmoved as they heard Foster convicted and doomed to the electric chair.

(Italics supplied).

RELATOR'S EXHIBIT NO. 79.

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(Page 3).

Jury Acquits Him

Ferndale Man Cleared of Woman's Accusations

Deliberating about an hour, a jury before President Judge Hiram H. Keller yesterday afternoon acquitted a 53-year-old Ferndale carpenter and mason, Stephen Guttman, of rape, assault and battery with intent to ravish, fornication and assault and battery.

The verdict was returned only several minutes before the Foster-Zietz murder jury, which had been sitting through a nine-day trial, filed into the court room.

President Judge Keller, who discharged the jury, thanked the men and women for their services and commended them on their satisfactory verdicts.

The charges were preferred by a colored woman and the costs of prosecution were placed on the county.

(Italics supplied).

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RELATOR'S EXHIBIT NO. 79.

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(Page 3).

We Noticed

Woman who watches taxes and public expenses *calling attention to the thousands of dollars it cost taxpayers to capture, try and convict just two of the trigger-happy bandits recently convicted and sentenced to the electric chair.*

Police official quoted as saying that, if the killers of Kelly were not given the death sentence, the electric chair should be destroyed . . . and his opinion being agreed with by those who heard the statement.

(Italics supplied).

Relator's Exhibit No. 80

RELATOR'S EXHIBIT NO. 80.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 7, 1948.

(Page 1)

Up To Late Hour This A. M. No Juror Had Been Gotten for Darcy Murder Trial

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Black-haired Davy Darcy, *22-year-old Philadelphian, whose partners in crime, Harry Zeitz, 18, and Harold Foster, 23, were found guilty last Friday and sentenced to die in the electric chair, went on trial this morning in Judge Hiram H. Keller's court.*

He is the third youth involved in the Feasterville Inn hold-up shooting and murder which took place last December.

Darcy is being defended by Attorney Webster S. Achey, of Doylestown, private counsel, and is being prosecuted by Assistant District Attorney Willard S. Curtin, with District Attorney Edward G. Biester associated.

The long ordeal of drawing a jury got under way at 10:15

Relator's Exhibit No. 80

this morning, *with both Judge Keller and Judge Calvin S. Boyer, the trial judge last week, on the bench.*

Attorney Achey's first objection this morning was overruled. Mr. Achey objected to the fact that the present panel was cut down to 81 jurors because *39 jurors had been previously excused.* Mr. Achey argued that the excusing of that many jurors was prejudicial to the defendant.

Judge Keller informed the defense attorney that the excuses were for illness and other unavoidable things.

A fourth member of the "trigger-happy" gang, Felix Capone, 16, of Phila. is to be tried later.

The gang's victim was William

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No Juror Had Been Gotten

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Kelly, who was mortally wounded while standing near the Feasterville Inn while the four were fleeing in Zietz's car the night of December 22. Another shot that night permanently crippled Alan (Reds) Hellerman, of Phila.

The first juror called for examination this morning was Mrs. Mabel Senderling, Perkasie, housewife, who was excused because of conscientious scruples against capital punishment.

From the start of the questioning of jurors this morning, it was evident that great difficulty will be met in selecting a jury.

Relator's Exhibit No. 81

Jurors informed the court that they had read a lot about the case and a number said that they had "formed a fixed opinion that could not be changed by the evidence".

All the jurors examined and challenged are being excused for the term.

Mrs. Anna E. Cole, of near Quakertown, a former New Yorker, whose husband is a chemical engineer employed in Lansdale, stated she does not object to death penalty, was challenged by the State peremptorily.

Eight jurors were called during the first hour and none accepted.

The sixteenth juror examined was accepted by both sides and he took the foreman's seat. He is William Dalton Pardoe, 64, Yardley, a Trenton rubber manufacturer.

(Italics supplied)

Relator's Exhibit No. 82

RELATOR'S EXHIBIT NO. 82.

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Darcy Murder Jury

No. 1—William Dolton Pardoe, Yardley; a Trenton rubber manufacturer; foreman of jury.
No. 2—Mrs. Anna W. Bucher, Newtown; housewife.
No. 3—Marvin D. Weidner, Telford; Clerk.
No. 4—Jesse H. Horne, Quakertown RD 3; farmer.
No. 5—Oliver C. Landis, Perkasie RD; farmer.
No. 6—Franklin T. Fretz, Perkasie; salesman.
No. 7—Roger Mason, Perkasie RD 2; farmer.
No. 8—Howard Price, Doylestown RD 2; farmer.
No. 9—L. Calvin Fluck, Quakertown; hosiery knitter.
No. 10—Mrs. Elva A. Shive, Dublin housewife.
No. 11—Mrs. Ruth G. Bliss, Doylestown, housewife.
No. 12—Mrs. Ann L. Reed, 28, Penn's Park, housewife.

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RELATOR'S EXHIBIT NO. 82.

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JUROR BEING QUESTIONED THROWS BOMBSHELL IN COURT

Two Women Among 11 Accepted Up to 11 A. M. for the Trial of Darcy on a Charge of Murder—An Extra Panel of 30 May Be Summoned—Less Trouble than in Trial of Zietz and Foster

---

When a juror, called for examination the the Darcy murder case yesterday, was asked if he had read anything about the case in the newspapers, he paved his way for a quick exit, but got in his opinion.

"Yes I have read a lot," commented the juror in answer to a question asked by the defense attorneys, "and it's the coldest-blooded murder that I ever read about."

Objections came almost simultaneously from Attorneys

Relator's Exhibit No. 82

Webster S. Achey and William M. Power for the defense. Judge Hiram H. Keller, who is trying the case, also informed the juror that he was out of order.

Attorney Achey for the defense asked that the case be continued because of the juror's answer, but Judge Keller over-ruled the motion and granted an exception. The task of drawing a jury continued as the outspoken member of the panel was excused, without a count on the direct challenge list. *The several jurors already seated were advised by the court to disregard the juror's comment.*

Eight jurors were accepted up until adjournment last night as the trial of Dave Darcy, 22-year-old *member of a four-team Philadelphia bandit gang that shot up the Feasterville Inn on the night of December 22, fatally wounded an innocent bystander outside the inn, and then held up the Deacon's Inn at Penndel, the same evening.*

Two co-partners in the crime, Harry Zietz, 18, and Harold Foster, 23, were convicted last week of first degree murder with the death penalty recommended.

Less trouble than the Zietz-Foster attorneys had two weeks ago in selecting a jury, is being experienced

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Juror Being Questioned

(Continued from First Page)

by the counsel in the Darcy case. It is quite likely that the jury will be complete today and that testimony may get under way this afternoon.

One woman was accepted among the first eight jurors drawn. She is Mrs. Anna W. Bucher, of Newtown township, wife of Dr. R. L. Bucher, and the mother of five children. She is No. 2 juror. The foreman is a trenton rubber manufacturer, William D. Pardoe, living in Yardley.

Mrs. Velma A. Rosenberger, wife of a Quakertown banker, said that she could discriminate as to the punishment in case of a first degree conviction in the Darcy case—either the death penalty or life imprisonment, but she drew a peremptory challenge from the defense. Harold Lake Bristol painter and father of six children, when asked whether he was physically able to stand the strain of what

might be a trial lasting a week or more, replied: "I guess I can, I have never had a doctor since I was born." But he, too, was challenged.

The jury challenging in the Darcy case is being conducted for the Commonwealth by Assistant District Attorney Willard Curtin, of Morrisville, but District Attorney Edward G. Biester, who prosecuted Zietz and Foster, is seated with Curtin.

There is a possibility, it was intimated yesterday, that an effort will be made in the Darcy case, by defense attorney, to prevent the Commonwealth from presenting evidence in the trial about crimes committed by the defendant-other than the Feasterville Inn and Deacon's Inn shootings. During the trial of Dietz and Foster, *the Commonwealth presented a large number of written statements in which the boy-bandit gang were hooked up with numerous holdups in various seetions.*

28 Jurors This A. M.

When court convened this morning there were 28 jurors left in the original panel from which to select the balance of the jury, four regulars and two alternates.

Challenged Yesterday

Among those challenged yesterday, either for cause or peremptorily, or excused by consent of counsel and court, were the following jurors: Alvin T. Albrecht, Telford RD; J. Harper Atkinson, Lahaska; John Barber, Bristol; Maude C. Buckman, Newtown; Walter S. Berger, Perkasie; Marguerite Berstresser, Perkasie; Charles A. Barndt, Perkasie;

Hugh P. Cassel, Telford; John J. Cole, Bristol; Erna M. Doane, Quakertown RD 1; Martin Frei, Haycock Run; John G. Ferguson, Andalusia; Miriam W. Flory, Sellersville; Emily O. Higgenbottom, Quakertown.

Joseph F. Hibbs, Morrisville; John E. Harrop, Morrisville; Ernest F. Hamm, Croydon; John R. Hansbury, Croydon; James G. Jackson Croydon; Russell F. Kleinman, Hartsville; Clifton Leedom, Neshaminy; Delbert Lynn, Bristol; Joseph E. Lownes, Newtown; Harold Lake, Bristol; Charles L. Miller, Doylestown; Nicholas Mislan, Morrisville.

R. Barclay Moon, Sellersville; Ethel G. Moyer, Sellersville; Elmer Ott, Hatfield RD; Francis M. Phillips, Ivyland; George R. Paxson, Langhorne; J. Alfred Rigby, Cornwells Heights; Frank Repetski, Bristol; Velma A. Rosenberger, Quakertown; Frank Sigley, Morrisville; Ira M. Swartz, Quakertown; Jacob Shive, Jr., Ottsville; Emma Shaddinger, Blooming Glen; Mabel Senderling, Perkasie; Wesley H. Talley, Forest Grove; Harry T. Westlake, Sellersville; Doris C. Wilson, Point Pleasant; Harry W. Wambold, Sellersville RD 1; Stanley R. McKnight, Perkasie RD1; and Alleine C. Gardiner, Sellersville RD 1.

Approves Death Penalty

Mrs. Warren Elville, Of Doylestown, when called as a juror for examination, said she had formed an opinion and does not object to capitol punishment. Her husband is a painter. The defense challenged for cause.

Two More Selected

Only two jurors were accepted during the first two hours this morning. One is L. Calvin Fluck, Quakertown hosiery

knitter, who was seated as No. 9 juror. The other is Mrs. Elva A. Shive, Dublin housewife.

There were 15 jurors remaining when court recessed for 20 minutes at 11 A. M.

Also Challenged

Challenged this morning were the following jurors: Robert W. Hall, Cornwells Heights; Clarence G. Angeny, Danboro builder; William S.V. Rodgers of Ivyland; Harold L. Loud, Bristol; Norman S. Penrose, Doylestown; Mrs. Lovada E. Schlichter, Trumbouersville; Samuel J. Illick, Hulmeville; Leonard Miller, Croydon R.D. 1; William H. Slaughter, Doylestown; Mrs. Ilse Mulligan, Upper Black Eddy; Mrs. Elizabeth G. Elville, Doylestown.

Mrs. Ruth G. Bliss, 60, Doylestown, whose husband, Albert Bliss, was challenged last week as an extra venireman in the Foster-Zietz case, was passed by the Commonwealth and accepted by the defense, and was seated as Number 11 juror shortly before noon today.

If necessary, an extra venire will be selected when court convenes this afternoon.

(Italics supplied)

Relator's Exhibit No. 84

RELATOR'S EXHIBIT NO. 84.

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GUEST EDITORIAL

Two Murder Convictions

Phila. Eve. Bulletin.

Cries of "*maudlin sympathy*" from the public were heard last Fall when a youth accused of killing two policemen escaped the electric chair. He did get a life sentence. *Several women were on the jury, and were blamed for failure to recommend death.*

No such cries are being heard as the result of two murder verdicts over this weekend. In Doylestown two youths were sentenced by a jury to be executed for murdering a man after a hold-up in Feasterville. In Philadelphia another jury, which had nine women among its members, voted a similar penalty in convicting the slayer of a policeman. Four women were on the jury in Doylestown.

These verdicts are a vindication of women as jurors, and *afford convincing evidence that opinion on use of the death penalty is not determined solely by sex.*

Members of these juries deserved the commendation they received from the trial judges.

(Italics supplied)

Relator's Exhibit No. 85

RELATOR'S EXHIBIT NO. 85.

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Darcy Murder Jury

No. 1—William D. Pardoe, Yardley; rubber manufacturer and foreman of jury.
No. 2—Mrs. Anna W. Bucher, Newtown; housewife
No. 3—Marvin D. Weidner, Telford; clerk.
No. 4—Jess H. Horne, Quakertown RD 3; farmer.
No 5—Oliver C. Landis, Perkasie RD; farmer.
No. 6—Franklin T. Fretz, Perkasie; salesman.
No. 7—Roger Mason, Perkasie RD 2; farmer
No. 8—Howard Price, Doylestown RD 2; farmer.
No. 9—L. Calvin Fluck, Quakertown; hosiery knitter.
No. 10—Mrs. Elva A. Shive, Dublin; housewife.
No. 11—Mrs. Ruth G. Bliss, Doylestown; housewife.
No. 12—Mrs. Ann L. Reed, Penn's Park; housewife.

Alternate Jurors

No. 1—William F. Hickey, 45, Morrisville; telephone construction superintendent.
No. 2—Mrs. Virginia Brillman, Point Pleasant; housewife

Relator's Exhibit No. 85

RELATOR'S EXHIBIT NO. 85.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 9, 1948.

(Page 1).

Trial of Darcy on Murder Charge Continued this A. M.

Court Over-rules Defense Objection to Taking Jurors to Scene of the Murder—Last Man in the Original Panel of 81 Completed the Jury—No Special Panel was Needed.

The Commonwealth opened its case this morning in the trial of Dave Darcy, 22-year-old Philadelphian, charged with the part he took in the murder of William Kelly, of Trevose, outside the Feasterville Inn on December 22, last year.

District Attorney Edward G. Biester, *whose prosecution gave the Commonwealth a double conviction last week against two co-partners of Darcy—and the death penalty*—opened to the jury this morning after court had convened at 10 o'clock. He told the jury that he would have more to say regarding the penalty later on in the trial. He made

Relator's Exhibit No. 85

no mention of the death penalty in his opening to the jury. Mr. Biester last week in the trial of Harry Zietz, 18, and Harold Foster, 23, asked for the death penalty when he made a summation to the jury.

The bullet-riddled interior of the Feasterville Inn was visited yesterday afternoon by the jurors, President Judge Hiram H. Keller and a few court officers, who viewed the rooms where the holdup took place two nights before Christmas and the locale where the fatal shot was fired outside the inn, by Zietz.

The jury, completed yesterday afternoon, is composed of four women and eight men—plus two alternates, a man and a woman. The alternates selected yesterday are William F. Hickey, 45, of Morrisville a New Jersey Bell Telephone construction superintendent; and Mrs. Virginia Brillman, Point Pleasant housewife and youngest member of the jury.

The entire panel of 81 jurors was used in picking the the venire that will decide Darcy's fate. Jurors were examined for the Commonwealth by Assistant District Attorney Willard S. Curtin, and District Attorney Biester; and for the defense by attorneys Webster S. Achey and William M. Power.

The Commonwelath contends that although the actual shot that finally caused the death of William Kelly was fired by Zietz, that the three others who participated in the Feasterville holdup are equally guilty of murder since the fatal

(Please turn to Page 8)

Relator's Exhibit No. 86

RELATOR'S EXHIBIT NO. 86.

DOYLESTOWN DAILY INTELLIGENCER.
JUNE 9, 1948.

(Page 8).

Darcy Murder Trial

(Continued From First Page)

shooting took place immediately following robbery.

The fourth member of the young quartet of bandits is Felix Capone, 16, who cannot read or write, and who will be tried later.

Darcy's parents were in court yesterday. His father was recently promoted to be assistant crier in the Philadelphia courts. Other friends of Darcy were also present yesterday as the jury was being selected.

Ask New Trial

During the operation of yesterday's proceedings, formal application was filed for a new trial for the convicted Zietz and Foster. The official papers contained the reasons for

a new trial application. Zietz's petition was filed by Attorney I. Louis Rubin, of Bristol, while Foster's petition was filed by Attorney Donald Smith, of Perkasie.

Opposed By Defense

District Attorney Biester's motion to have the jury taken to the scene of the crime, was objected to by Defense Attorney Achey on the grounds that it would be prejudicial to the defendant. The objection was over-ruled by Judge Keller and an exception granted.

The fact that the last juror needed was selected from the final number of the panel of 81, made it unnecessary for Sheriff H. Raymond Ahlum to carry out the orders of the court that had been prepared in advance, for a special venire of 30 jurors. *The jury was completed at 1:50 p.m. Tuesday and sworn in five minutes later.*

Among the jurors who were challenged for various reasons, just before recess yesterday noon, and just before the panel was completed, were the following:

Mrs. Eva F. Kinsey, Telford RD 1; Mary E. Singley, Upper Black Eddy; Edmund C. Anderson, Langhorne RD 2; Mrs. Emily V. Maddux, Pipersville, housewife; Carlton A. Palmer, Morrisville, dairyman; Noah M. Rice, Perkasie R.D. 2 farmer; Mrs. Virginia Mann, Perkasie; Robert H. Clarendon, Buckingham township; Mrs. Rachel L. Fox, Quakertown R.D. 2; Dudley E. Bell, Bristol; George H. Kerns, Colmar.

The First Witness

The Feasterville Inn's physical layout was described in plans made by William S. Erwin, the first witness called this morning.

Relator's Exhibit No. 86

Inn's Owner Testifies

John R. Naysmith, proprietor of the Feasterville Inn, identified a group of photographs taken at the scene of the crime.

Naysmith testified that 18 patrons were in his place on the night of the holdup on Dec. 22. He described the holdup as he saw it.

"Foster was in front of the cash register with a gun pointed at me", Naysmith testified. "He said: 'This is a stickup'. I heard two shots, and some scuffling, and then heard more shots. Foster fired twice toward the entrance door.

"I turned around and saw Darcy with a gun in his hand pointing toward the people who were lined up against the wall. And I saw a man, Alan Hellerman, lying on the floor.

"Darcy walked over from the juke box and said: 'Where's the hero that hit me,' and then he said 'Why don't somebody take this gun off me? I feel like shooting somebody else. Where's the police?' Then he said, how about the watches.' The money had been taken out of the wallets of the patrons by Foster.

"Darcy took some watches, and to one patron he commented: 'You shouldn't throw the watch at me, pop; you should hand it to me."

(Italics supplied).

Relator's Exhibit No. 90

RELATOR'S EXHIBIT NO. 90.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 10, 1948.

(Page 2).

(Editorial).

VERDICTS HIGHLY PRAISED

NEWSPAPERS and individual citizens have in the past week highly praised the jurors who returned a verdict calling for capital punishment for three convicted killers. And on those juries were women in each instance.

The Almeida verdict in Philadelphia and *the conviction of Zietz and Foster for murder in this county have been universally lauded.*

This endorsement of the extreme punishment for callous killers indicates very definitely that the public has become disgusted with the pampering of vicious criminals, although that was clear earlier.

Earlier the jury which convicted a Philadelphia murderer in the first degree . . . but only designated life imprisonment . . . was subjected to a storm of denunciation by a great many persons.

Imposition of capital punishment may not end all murders, but it does intimidate a great many potential killers.

(Italics supplied)

Relator's Exhibit No. 94

RELATOR'S EXHIBIT NO. 94.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 12, 1948.

(Page 1).

Judge Boyer Warns that Bucks County is Tired of Thieves from Phila.

Court Warns Youth that County Intends to Do Something About It—Asks Defendant Whether He Wants to Get Into Position of Killers who Were Sentenced to Electric Chair

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Asserting that "We don't propose to nail all our property fast here in Bucks county just because thieves from Philadelphia want to pick up everything which isn't being watched," Judge Calvin S. Boyer, who sentenced an 18-year-old youth to prison yesterday, asked, *"What business did you have to come up here in the first place?"*

Lecturing Robert White, 18, 8388 Bustleton avenue, Phila. who pleaded guilty to stealing a car-radio out of a car belonging to Henry Bellardo, Fallsington, Judge Boyer said:

Relator's Exhibit No. 94

"So far as your testimony is concerned, you have not shown any excuse at all to come out of Philadelphia to Bucks County."

Upbraiding the youth, who is one of a trio charged with larceny and receiving stolen goods, Judge Boyer asked him: *"Have you heard what's going on down stairs?"*

The youth answered meekly, "Yes".

"Do you want to wind up like that?" referring to the two hold-up murderers who were recently doomed to the electric chair.

"I'd like to have another chance", said the youth, whose mother described him as a "good boy".

"We in Bucks county are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it", Judge Boyer said.

The youth pleaded guilty to stealing a car radio which they thought was junk. George Johnson, 8390 Bustleton avenue, and Thomas L. Jones, 8917 Bustleton avenue, who were arrested with White on May 23, will stand trial later on.

The youth was sentenced to pay the costs of prosecution, serve

(Please turn to Page 6)

Relator's Exhibit No. 95

RELATOR'S EXHIBIT NO. 95.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 12, 1948.

(Page 6).

Judge Boyer Warns Thieves

(Continued From First Page)

not less than four months nor more than 12 in the County Prison.

"I do not want White to associate with the other two defendants while in prison", Judge Boyer said to Sheriff H. Raymond Ahlum. "Unless you get an entirely different idea or conception of what belongs to you and respect for other people's property, you will have a sorry life", Judge Boyer warned the youth.

* * *

(Italics supplied)

Relator's Exhibit No. 94

RELATOR'S EXHIBIT NO. 94

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 12, 1948.

(Page 1).

Darcy Friend is Arrested

Hurrying to the trial of his friend *David Darcy, who is on trial for murder in the Bucks county court house at the present time*, Charles M. Edward, 21, of 3024 Longshore ave., Phila., was arrested yesterday on charges of failing to stop at the scene of an accident, failing to identify himself, and reckless driving.

* * *

(Please turn to Page 5)

Relator's Exhibit No. 96

RELATOR'S EXHIBIT NO. 96.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 12, 1948.

(Page 5).

Darcy Friend is Arrested

(Continued From First Page)

* * *

At the State Police sub-station, Edward at first denied the hit-run charge, but later signed a statement of confession. He told police that he was a friend of Darcy's and was hurrying to Doylestown to attend the court session.

* * *

(Italics supplied)

Relator's Exhibit No. 101

RELATOR'S EXHIBIT NO. 101.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 15, 1948.

(Page 1).

Darcy Guilty of Murder, With the Death Penalty Recommended

"Expected It" Killer Told an Officer After Verdict

Three Death Penalties Imposed Within Two Weeks on Members of the Mob that Held Up and Shot Up Feasterville Inn, During Which One Man Was Killed, Another Crippled for Life and a Third Shot

Bucks county justice made it "three in a row" yesterday as David Darcy, 22-year-old member of a ruthless bandit mob, was convicted of murder in the first degree with the penalty set as death.

He was the third member of the gang of four charged

Relator's Exhibit No. 101

with the murder of William Kelly, 38, of Trevose, who was doomed to death in the electric chair, during the past two weeks. His co-partners are Harry Zietz, 18, and Harold Foster, 23. The fourth and youngest member of the gang is Felix Capone, 16, who will be tried later. Kelly, an innocent bystander, was shot outside the Feasterville Inn.

A jury of five women and seven men deliberated a trifle less than two hours yesterday afternoon after President Judge Hiram H. Keller had charged them as to the law.

It was 4:40 p. m., when the verdict of guilty was announced by the foreman of the jury, William D. Pardoe, of Yardley. Defense Attorney Webster S. Achey, who earlier in the day had asked the jury to find his client guilty of first degree murder with life imprisonment, then requested that the jurors be polled separately, and this was done.

Unanimous From the Start

The death penalty, it was said by a member of the jury after the case, was the unanimous choice of all jurors from the start of deliberation.

Darcy took it like a stoic. According to police who have been

(Continued on Page 5)

Relator's Exhibit No. 102

RELATOR'S EXHIBIT NO. 102.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 15, 1948.

(Page 5).

Darcy Guilty of Murder

(Continued From First Page)

guarding him on his trips back and forth to the court house from the Bucks County Prison, he sensed the verdict several days ago.

Darcy Expected It

"How long were they out?" Darcy asked a State trooper as he was being returned to the court room yesterday afternoon to hear the verdict. He was informed "about two hours".

After the verdict, his only comment was; "I expected it."

Slipped Him Lucky Piece

As Darcy was being led to his cell in the County Prison yesterday afternoon, he passed the cell of his partners, Zietz and Foster. Foster quickly slipped a small object to Darcy, but the eye of a watchful guard saw the move. The object was a small good luck trinket.

Darcy stood at attention between State troopers and a

deputy sheriff as Clerk of Quarter Sessions Matthew Godshall polled the jurors individually. Not once did he move.

Nearby were Darcy's father, other members of the family including a brother, and his girl friend, who have been in court most of the trial which started a week ago yesterday. They bowed their heads as the last juror replied "guilty".

The case was placed in the jury's hands at 2:40 p. m., following Judge Keller's charge. Observing attorneys offered the opinion that the jurist's charge was "most fair" to the defendant.

Jurors who served on the case were discharged with the thanks of the court. They had been "in the custody of court officers" for nine days.

As the large crowd left the court house, where many had gathered to hear the verdict, there was wide-spread comment heard from men and women who seemed to unanimously approve of the verdict and the efficient manner in which the Commonwealth had prepared its case. *They seemed to "pity the parents; not the defendants" in this case.*

Cost to Taxpayers

Several persons acquainted with court costs estimated yesterday that if the *four members of the Philadelphia bandit-gang had received life imprisonment, instead of the death penalty, it would have cost the taxpayers close to $200,000, if they were to live until they were 65.*

An estimate was made yesterday that before the trials are completed, and with a death penalty in each case, the costs will amount to approximately $25,000.

The conviction of three for murder, with the death penalty recommended—within a period of three weeks—is also somewhat of a record for Bucks county.

(Italics supplied)

Relator's Exhibit No. 105

RELATOR'S EXHIBIT NO. 105.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 17, 1948.

(Page 2).

(Editorial).

RAUS MIT'EM

JUDGE CALVIN S. Boyer's warning to tough crooks from Philadelphia and other places to keep out of Bucks county or take the consequences . . . should be impressive because recent juries of men and women convicted three trigger happy young holdup men involved in the killing of a respected resident of Feasterville, without provocation, and recommended their execution in the electric chair.

The warning has been given before, but not under such impressive circumstances.

At any rate the jurors in the Feasterville slaying case probably indicated the reaction of people in this county to the vicious lawlessness of a great many young crooks who have operated in the county.

Conviction of even murderers in the first degree with the death sentence have not been numerous in recent years . . .

Relator's Exhibit No. 105

which should convince potential bandits and killers that leniency on the part of jurors is not likely to be easy to get.

For a long time jurors or the court have made it clear that they wanted to give the young offenders every chance to show that they would reform . . . *but the evidence appears to unmistakably indicate that Bucks countians have concluded that leniency has merely been taken as an indication of weakness. The conviction of the three young men for a wanton and unprovoked murder . . . and the imposition of the death sentence . . . together with Judge Boyer's warning . . . it is to be hoped will cause bandits and killers to steer clear of the county.*

Getting tough has worked that way in other instances.

(Italics supplied)

Relator's Exhibit No. 106

RELATOR'S EXHIBIT NO. 106.

DOYLESTOWN DAILY INTELLIGENCER,
JUNE 19, 1948.

(Page 2).

The Gossiper

YOU OFTEN hear some one say: "They would steal anything that wasn't nailed down."

Well, the other day Judge Calvin S. Boyer, in the local court, while addressing a Philadelphia youth convicted of theft . . . said that Bucks countians are not going to be forced to nail down everything they own in order to prevent Philadelphia crooks from stealing them.

"Believe me, judging from what a County Seat resident told me the other day . . . nailing things down would not provide much protection.

The story told me was that some thief or thieves had stolen a valuable ornamental iron fence from around a property almost in the heart of our "fair city".

* * *

(Italics supplied).

Relator's Exhibit No. 107

RELATOR'S EXHIBIT NO. 107.

NEWTOWN ENTERPRISE,
JANUARY 1, 1948.

(Page 1).

Easy Xmas Money Was BANDITS Aim

Four Young Men Caught After Two Hold Ups and Three Shootings

Four Philadelphia bandits who shot up two taprooms in lower Bucks county late Monday night, December 20, fatally wounding one man and injuring two others, today are to face murder charges.

District Attorney Edward Biester, of Bucks county, said that Philadelphia authorities will be asked to turn them over to him for prosecution following the death of William Kelly, 38, of Treyose, in Abington Hospital Wednesday night.

A few hours after four young men stuck up the Feasterville Taproom about midnight Monday, Philadelphia police

captured them in Philadelphia. The arrest was an important one since the youths under questioning admitted a long list of hold-ups with violence. At Feasterville three men were shot. All are expected to recover.

Those arrested are: Harold Foster, 23; David Darcy, 22; Harry Zeitz, 18; and Felix Capone, 16; all of Philadelphia. *Their admitted depredation included the recent hold up at Bell's Corner, Bustleton, and others in Montgomery County and in New Jersey.*

Two patrolmen arrested the men in an automobile at Frankford avenue and Friendship street, Philadelphia, and said they answered the description of the bandits.

The *gunmen* shot Edward Wunsch, 25, and Allen Hellerman, both of Feasterville, patrons of the Feasterville Cafe on Bustleon pike.

They took a total of $195 from 15 patrons and the cash register. Upon leaving, the bandits fired again, wounding William Kelly of Trevose in the head.

Kelly was taken to Abington Hospital, while State Police took Wunsch to Nazareth Hospital and Bucks County Rescue Squad took Hellerman to Nazareth Hospital.

Hellerman, with a bullet in the neck, was later removed to Temple University Hospital, Philadelphia. Wunsch received *wounds in the right arm and shoulder.*

While a widespread police hunt got under way, *the bandits entered Deacon's Inn near Penndel,* taking $140 from 12 male customers and $100 from the proprietor, Fred Lachenman.

The story of the hold-up at Feasterville Tavern as told by the proprietor, John Naysmith, nephew of James Brown, former owner, is as follows:

(Continued on Page Three)

Relator's Exhibit No. 108

RELATOR'S EXHIBIT NO. 108.

NEWTOWN ENTERPRISE,
JANUARY 1, 1948.

(Page 3).

BANDITS Aim

—Continued from Page One—

"I was back of the bar at 11:30. There were about 18 customers in the place, some of them playing suffleboard in the rear room. Three young men, about 22 years old, all white and unmasked, came into the place, brandishing guns. One of them leaped over the bar yelling 'This is a stick-up'. One of the *bandits* went to the back room and the group there started to wrestle with him. The *bandit* finally brought those from the rear room to the main tap room. A woman from Fox Chase ran out of the place and over to the Buck Hotel across the street to get help.

"One of the *bandits* then fired his gun and shot Ed. Wunsch. Wunsch's father-in-law got Wunsch out the back door in some manner while the *bandits* were still there. Hellerman had also been shot and was lying on the floor in the bar room. The *bandits* then emptied the cash register

of about $68 or $70. They made everybody put their wallets on the bar, and the *bandits* emptied them. Then the *bandits* took the patrons' wristwatches. I think they got about five in all. I don't know how much money they got from the patrons' wallets. My wife was in the kitchen and they brought her out with the crowd." Naysmith and his wife, and James Brown reside at the taproom.

Continuing Naysmith said: "The *bandits* then shot out the telephone and went to the door. One called to us "Keep quiet for quite a while." They shut the door, but in a few seconds, one *bandit* opened it again and sticking his head in and waving his gun called out 'Don't move, Merry Christmas, One man, "Bill" Kelly, was shot in front of the Buck Hotel as the *bandits* left. Kelly was standing there with a couple of other men, and I think the *bandits* shot when they heard the group there. I don't believe Kelly and his friends knew what was going on across the way."

Naysmith says the trio made their get-away in a 1939 Plymouth sedan.

Fred W. Valeria, proprietor of *Deacon's Inn, Lincoln Highway, Penndel*, the *second place* visited by the bandits, said the robbery at his place occurred at 12:15 A. M. At the time there were four men in the place and they were playing shuffleboard.

"My wife and I were at the bar when three men entered. They ordered drinks, but I noticed one of them was rather young so I refused to serve him. The men sat at the bar sipping their drinks for a while, when one of the men got off his stool and appeared to be headed for the juke box", said Mr. Valeria.

Mrs. Valeria, who was standing outside the bar, saw him reach in his pocket, pull out a gun, and go under the bar. He pointed the gun at her husband and said "This is a stick-up. Get in front of the bar and rest your hands there."

Relator's Exhibit No. 108

Simultaneous with this, the other two men pulled out guns and covered the four customers who were playing shuffleboard. They ordered them to empty their pockets and one of the *gun-wielding men* said "Hurry up. We just shot two men a little while ago for being so slow". They took jewelry and wallets from the men.

As this was going on the man behind the bar emptied the register, and got between $35 and $40 in cash, and, not satisfied with what he got from there, demanded more.

Mr. Valeria told him there was no more money, so the man behind the bar came out in front of it and started for the kitchen to see if he could find any more loot. Mrs. Valeria pleaded with him not to go in there as her grandchildren were sleeping there. He decided not to.

After satisfying themselves they had stolen all available, one man stood at the bar, another sat by the door, and a third went to the piano and began playing "boogie-woogie". As this was going on a fourth man entered. He was also armed.

Suddenly they decided to leave. Three of the men went to a car and started it, the fourth man remained and pulled the phone connection out. As he was leaving he turned and fired a quick shot over the heads of Mr. and Mrs. Valeria saying, "You'd better not follow us now."

(Italics supplied)

Relator's Exhibit No. 109

RELATOR'S EXHIBIT NO. 109.

NEWTOWN ENTERPRISE.
JUNE 3, 1948.

(Page 1).

Youths Escapade Ends in Murder

Two of Four Now on Trial for Feasterville Shooting.
December 22

The sordid tale of thrill seeking youths whose escapade ended in murder is in its second week in criminal court at Doylestown. Two of the four who wantonly shot up the Feasterville Inn during last Christmas week are on trial.

Witnesses have testified in the murder trial of Harold Foster, 23, and Harry Zeitz, 18, both of Philadelphia, of the hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later.

One of the leading Commonwealth witnesses *Eddie Wuensch*, 26-year-old Feasterville sheet metal worker, said he was in the shuffleboard room at the tavern, *when David*

Relator's Exhibit No. 109

Darcy, one of the bandits yet to be tried, came in and fired two shots.

"I was scuffling with *Darcy* and all of a sudden I felt something hot in my right arm and left shoulder", Wuensch testified. "Lots of shots were being fired. I was later taken to the hospital.

"They left me come home for Christmas, but I had to go back to the hospital for an operation after Christmas; but the operation was not successful in removing one of the slugs in my shoulder.

"Before I was shot I saw neither Zietz nor Foster—they were in the adjoining barroom."

The witness Wuensch testified

(Continued on Page Two)

Relator's Exhibit No. 110

RELATOR'S EXHIBIT NO. 110.

NEWTOWN ENTERPRISE,
JUNE 3, 1948.

(Page 2).

Murder Trial

—Continued from Page One—

that after an operation on his back he had to take a six weeks' rest, and that pains in his back constantly prevent him from doing the type of work he has been doing.

Another witness was *Howard Polmateer*, of Holland, a patron the night of the hold-up, who described what he saw.

The defense attorneys asked no question of the witnesses Wuensch and Polmateer.

Frank Fronsdale, 45, of Feasterville, a painter, testified he was in the tavern with George Roth and saw Zeitz and Foster at the bar.

"I saw Foster jump over the bar, pull a gun and declare it was a stickup—he had a gun in his hand and he swung it toward the bartender.

"I heard two shots from the shuffleboard room. Then a fist fight started, and more shooting started. I saw *Darcy*

Relator's Exhibit No. 110

shoot Eddie Wuensch. Zietz, too shot at Wuensch. Zietz fired 2 shots that I saw. Other shots were fired from the back of the bar.

"I saw *Darcy* fire two shots into the telephone mouthpiece, and heard one of the three holdup men say he wished some cops would come in so he could shoot them up."

James Brown, 67, of Feasterville, owner of the building where the holdup occurred, and an uncle of John R. Naysmith, the proprietor, testified that he "put his hands up, the same as the others did," after he had served a beer to Foster.

"Foster pointed a gun at me as well as the rest of the people," Brown testified. "Hellerman and Darcy were scuffling in the bar. I saw Foster take deliberate aim and fire 2 shots in direction of Hellerman and *Darcy*.

"I saw at least 3 shots fired by Zietz's gun in the same direction, and I saw Hellerman fall, Edward Wunsch was also in the scuffle. Zietz shot 3 times in succession before Foster fired."

Brown testified that he saw Kelly lying on the ground outside the tavern after the holdup.

Mrs. Gertrude Raistrick, 43, of Feasterville, testified that she and her husband were in the tavern looking at televised fights on the night of December 22, 1947, between 10 and 11 P. M. Virginia Stickel also accompanied the Raistricks.

"I saw Zietz shoot Eddie Wunsch and I saw *Darcy* fire shots too," the witness said. "When Foster fired, I had to dodge or I'd have gotten it", Mrs. Raistricks added.

"Zietz fired first", Mrs. Raistrick continued. "Then Foster fired two shots that I saw, and Hellerman fell and I fell too. I saw *Darcy* reload his gun in front of me."

Mrs. Raistricks said that Foster looked at her wedding ring and said, "Oh, you're married, we don't want her ring."

Harrison Raistrick, 53, husband of the previous witness.

corroborated his wife's testimony. He said he saw Zietz fire directly at Eddie Wunsch.

"I can account for about 10 shots fired inside the tavern," Harrison Raistrick testified. "I put $8.03 on the bar. Foster was taking money out of the wallets, putting it in his pocket. Zietz was at the door with a gun covering the patrons.

"Zietz picked up Hellerman's hat and put it on his head, and said, "You won't need that where you're going.' Hellerman had been shot and was lying on the floor, in a bleeding condition.

"I knew the victim Kelly for about 16 years. I saw him laid out at the funeral parlor".

Frank Walter Testifies

Frank Walter, 29, of Feasterville, a friend of the victim Kelly, stated that he saw Kelly at 11 P. M. at the Buck Hotel on the night of the holdup, and was talking to him for some time.

"About 11:25, Mrs. Lewtwyler rushed into the hotel and said there was a shooting at the Feasterville Inn", Walter testified. "She was hysterical and ran.

"Kelly and I went down the road and were standing at an intersection near the Feasterville Inn, talking about the reported holdup. Right then we were not certain about there being a holdup.

"There were no street lights around us, but we saw two men run out from the inn. Horace Patterson, a friend of mine, was standing with Kelly and I.

"There was an automobile parked in front of the Feasterville Inn, with the front grille of the car pushed in.

"One of the men got in behind the driver's seat of the

car and the other man got in the other side, in front. The car remained there a minute and the lights were turned on and off, only one light worked. The motor of the car was running.

Describes Shooting

"Then the car started up the Newtown road. As the car passed us, I noticed two sharp flashes from the driver's window, two orange-like flashes, and a noise like a revolver shot.

"Kelly fell to the ground.

"We were not over 10 to 20 feet away from the car when the shots were fired. Kelly was bleeding from the back of his head. Patterson ran to get help and the bandit car continued on.

"Kelly was not conscious after he fell, but he did regain consciousness a few minutes later and said: "Who were they? Why did they shoot me? Look! I'm paralyzed."

"Then we took Kelly to the Abington Memorial Hospital. I next saw Kelly in the hospital on Christmas Day. And he was dead."

(Italics supplied)

Relator's Exhibit No. 115(C)

RELATOR'S EXHIBIT NO. 115(c).

CRIMINAL MINUTES,
BUCKS COUNTY,
1948.

(Page 9).

MAY TERM A.D. 1948

1948 JUNE 7—COURT CALLED AT 10 O'CLOCK A.M. HON. HIRAM H. KELLER, P.J. AND HON. CALVIN S. BOYER, J. PRESIDING.

EO DIE—COURT RECESSED 12:02 UNTIL 1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 5:33 O'CLOCK P.M. UNTIL TUESDAY, JUNE 8, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 8—COURT CALLED AT 9:30 O'CLOCK A.M. HON. HIRAM H. KELLER, P.J. AND HON. CALVIN S. BOYER, J. PRESIDING.

Relator's Exhibit No. 115(C)

EO DIE—COURT RECESSED AT 12:10 UNTIL 1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 3:55 O'CLOCK P.M. UNTIL WEDNESDAY, JUNE 9, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 9—COURT CALLED AT 10 O'CLOCK A.M. HON. HIRAM H. KELLER, P.J. AND HON. CALVIN S. BOYER, J. PRESIDING.

EO DIE—COURT RECESSED AT 12:05 UNTIL 1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 5:05 O'CLOCK P.M. UNTIL THURSDAY, JUNE 10, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 10—COURT CALLED AT 10 O'CLOCK A.M. HON. HIRAM H. KELLER, P.J. AND HON. CALVIN S. BOYER, J. PRESIDING.

EO DIE—COURT RECESSED AT 12:00 UNTIL 1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 3:55 O'CLOCK P.M. UNTIL FRIDAY, JUNE 11, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 11—COURT CALLED AT 10 O'CLOCK A.M. HON. HIRAM H. KELLER, P.J. AND HON. CALVIN S. BOYER, J. PRESIDING.

EO DIE—COURT RECESSED AT 12:00 UNTIL 1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 9:30 O'CLOCK P.M. UNTIL SATURDAY, JUNE 12, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 12—COURT CALLED AT 10 O'CLOCK A.M. HON. HIRAM H. KELLER, P.J. AND

Relator's Exhibit No. 115(C)

HON. CALVIN S. BOYER, J. PRESIDING.

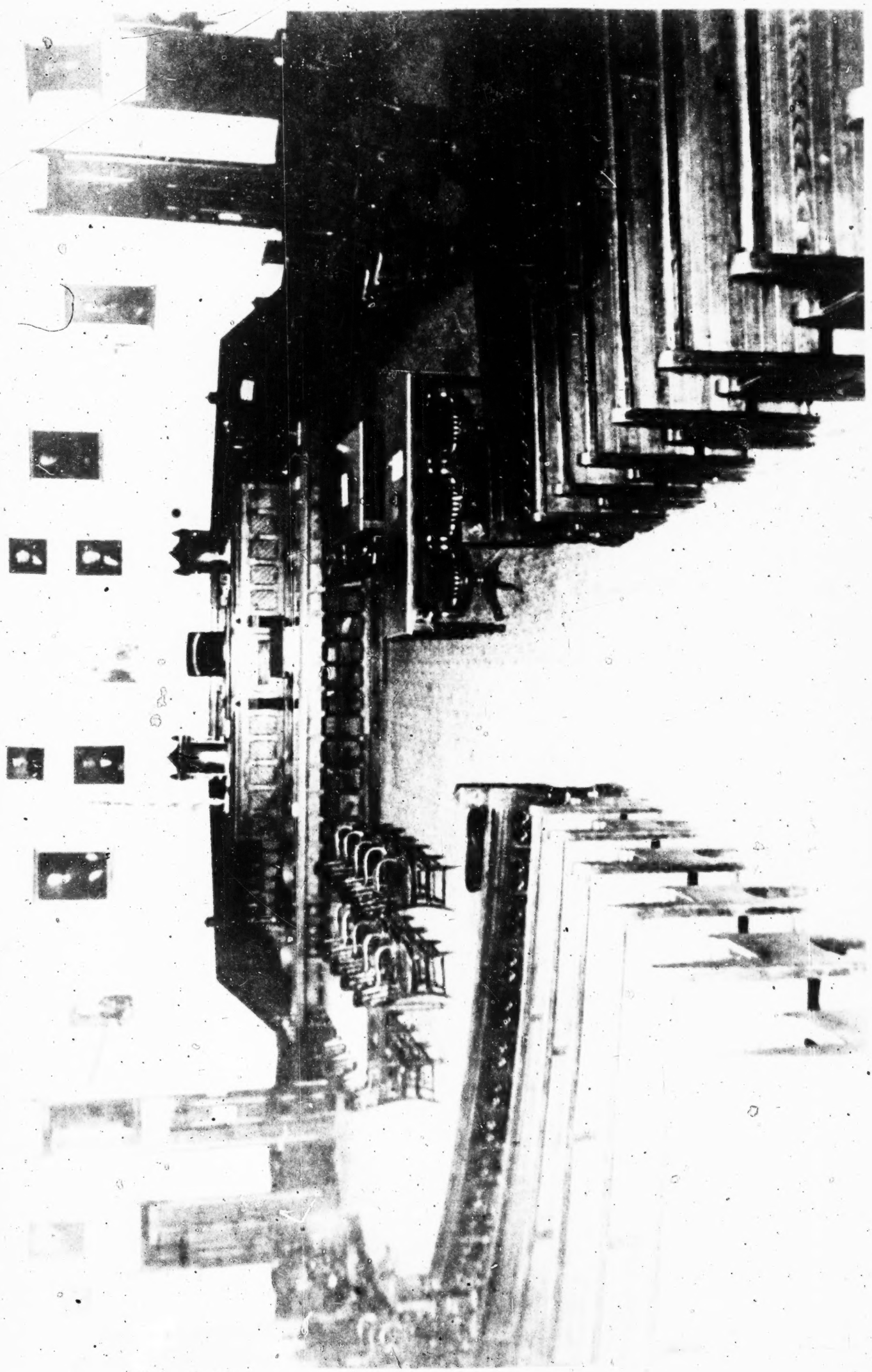
EO DIE—COURT ADJOURNED AT 11:13 O'CLOCK A.M. UNTIL MONDAY, JUNE 14, 1948 AT 10 O'CLOCK A.M.

1948 JUNE 14—COURT CALLED AT 10 O'CLOCK A.M. HON. HIRAM H. KELLER, P.J. AND HON. CALVIN S. BOYER, J. PRESIDING.

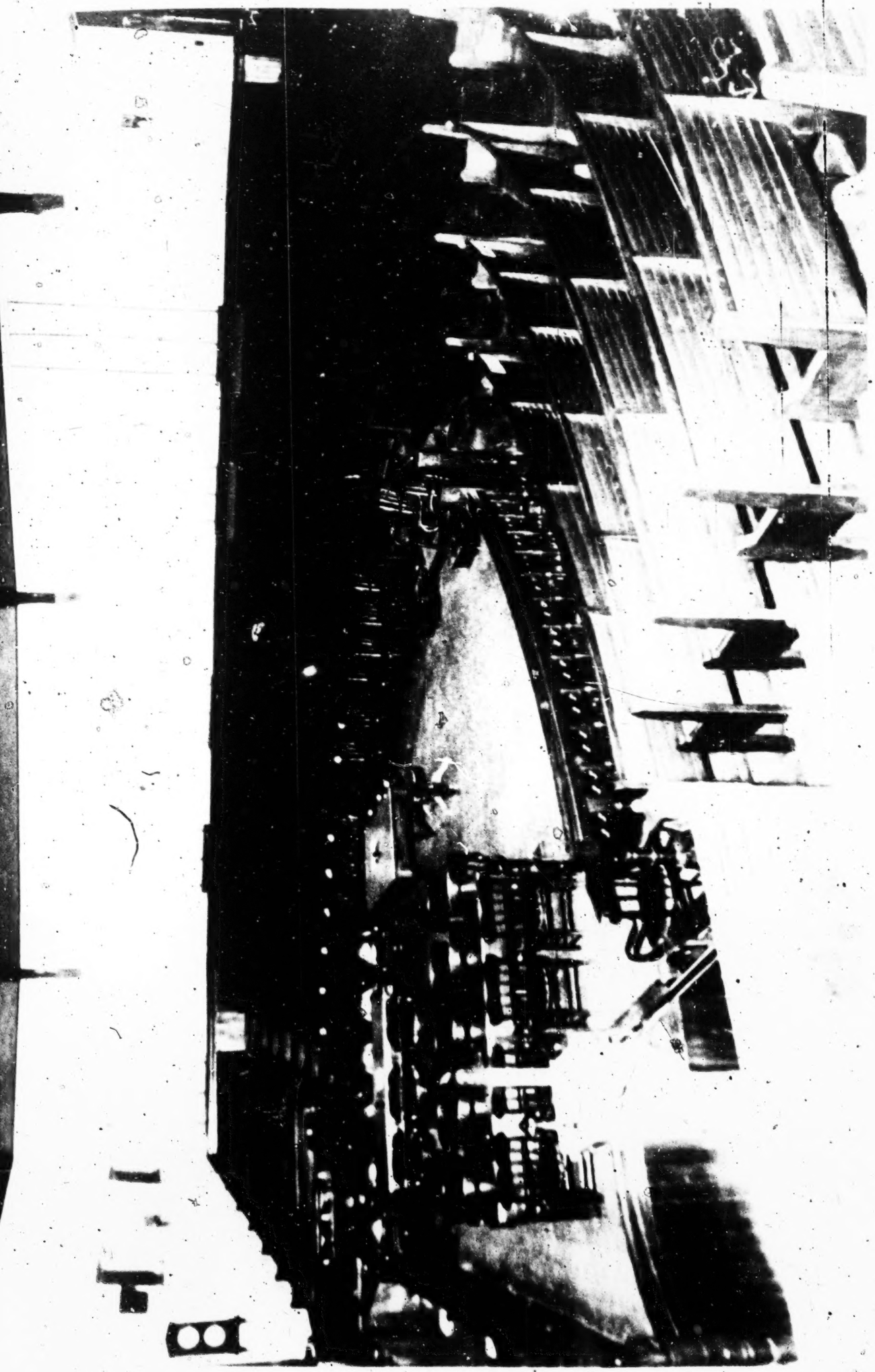
EO DIE—COURT RECESSED AT 11:45 UNTIL 1:30 O'CLOCK P.M.

EO DIE—COURT ADJOURNED AT 4:42 O'CLOCK P.M.

Relator's Exhibit No. 118 (1120 a)



Relator's Exhibit No. 119 (11-21-a)



Relator's Exhibit No. 123(A)

RELATOR'S EXHIBIT NO. 123(A).

QUAKERTOWN FREE PRESS,
MAY 20, 1948.

(Page 1).

WBUX Makes Appeal to Find Missing Girl

Began Broadcasting This Morning from Quakertown and Doylestown Studios—At 1570 on Your Radio Dial —Open House Saturday to Observe Programs

---

WBUX, the long-awaited Radio Station, came on the air this morning at 9 A.M. Beginning to-morrow, the hours of broadcasting every day in the week is from seven a.m. to eight p.m.

After completing four graveyard shifts of equipment test runs, the station received permission late yesterday from the Federal Communication Commission to begin regular broadcasting today.

This procedure is unusual in the fact that as a rule 10 days' equipment tests are normally required. However, in

Relator's Exhibit No. 123(A)

view of the fact that the FCC inspector found WBUX in perfect operating condition when he made his tour of inspection on Tuesday, the local station was permitted to cut short its test runs by six days. "It has been a long time since I've seen an installation as complete and efficient as WBUX," was the way FCC inspector Moreland summed up the situation.

The station began commercial broadcasting this morning after conducting impressive inaugural ceremonies from both the Quakertown and Doylestown studios.

* * *

(Italics supplied)

Relator's Exhibit No. 123(C)

RELATOR'S EXHIBIT NO. 123(C).

QUAKERTOWN FREE PRESS,
MAY 27, 1948.

(Page 1).

Selected Jurors—Zeitz-Foster Murder Trial

Zeitz-Foster Trial Enters 4th Day—Drunken Drivers Head Court Trials List

---

Three Localities Chosen

With both Judge Hiram H. Keller and Judge Calvin Boyer on the bench, criminal court term opened promptly at 10 a. m., in Doylestown on Monday. One of the first announcements to be made in court was the appointment of three new tipstaffs. Mrs. Gwinner, of Doylestown, and Mrs. VanSant were named temporary tipstaffs, while Howard Clymer, of Warrington, former deputy sheriff, of Bucks county, was appointed to a permanent post.

* * *

(Italics supplied)

Relator's Exhibit No. 123(C)

RELATOR'S EXHIBIT NO. 123(C).

QUAKERTOWN FREE PRESS,
MAY 27, 1948.

(Page 1).

COURT NEWS POPULAR WITH WBUX LISTENERS

Trading Area Extended to Wider Area—Organizations Invited to Send WBUX Their Announcements for Broadcasting—Out of Town Shoppers Visit Studios

---

The news of the Bucks County Court brought at noon and in the evening over WBUX is proving very popular with the listeners.

WBUX reporters sat at the press table and brought timely news of jury selections, tipstaff appointments, attorney assignments during this week.

* * *

(Italics supplied)

Relator's Exhibit No. 123(D)

RELATOR'S EXHIBIT NO. 123(D).

QUAKERTOWN FREE PRESS,
JUNE 10, 1948.

(Page 1).

New Services Being Added to Programs

Many WBUX Fan Letters Arrive—Fireman's Parade at Bristol to be Announced Saturday

---

Classified of the Air

Fan letters, postal cards and telephone calls are coming into the WBUX studios at Quakertown and Doylestown every day. Many listeners of this area's radio station turn

Relator's Exhibit No. 123(D.)

on their radio at 1570 on your dial at seven in the morning and keep it turned in until 8:30 at night when the station leaves the air waves.

* * *

The local news is proving highly interesting and from thirty to forty items of deaths, accidents, graduations, events and meetings are broadcast daily. *The murder trials at the Court house, Doylestown, are being covered by WBUX reporters, and at noon and evening the undertakings of the court are read over the air.*

* * *

(Please turn to Page 2)

Relator's Exhibit No. 123(E)

RELATOR'S EXHIBIT NO. 123(E).

QUAKERTOWN FREE PRESS,
JUNE 10, 1948.

(Page 2).

New Services

(Continued from Page 1)

It is believed that WBUX is the only radio station in Pennsylvania to operate with two complete studios in different towns. Many small stations serving more than one town are limited as to the programs they can present because of the one studio setup.

WBUX, however, is so organized that complete programming of news, music and live talent can be brought to the listeners of Bucks county and the North Penn with equal ease and clear reception.

In keeping with its plan to make the station a true public

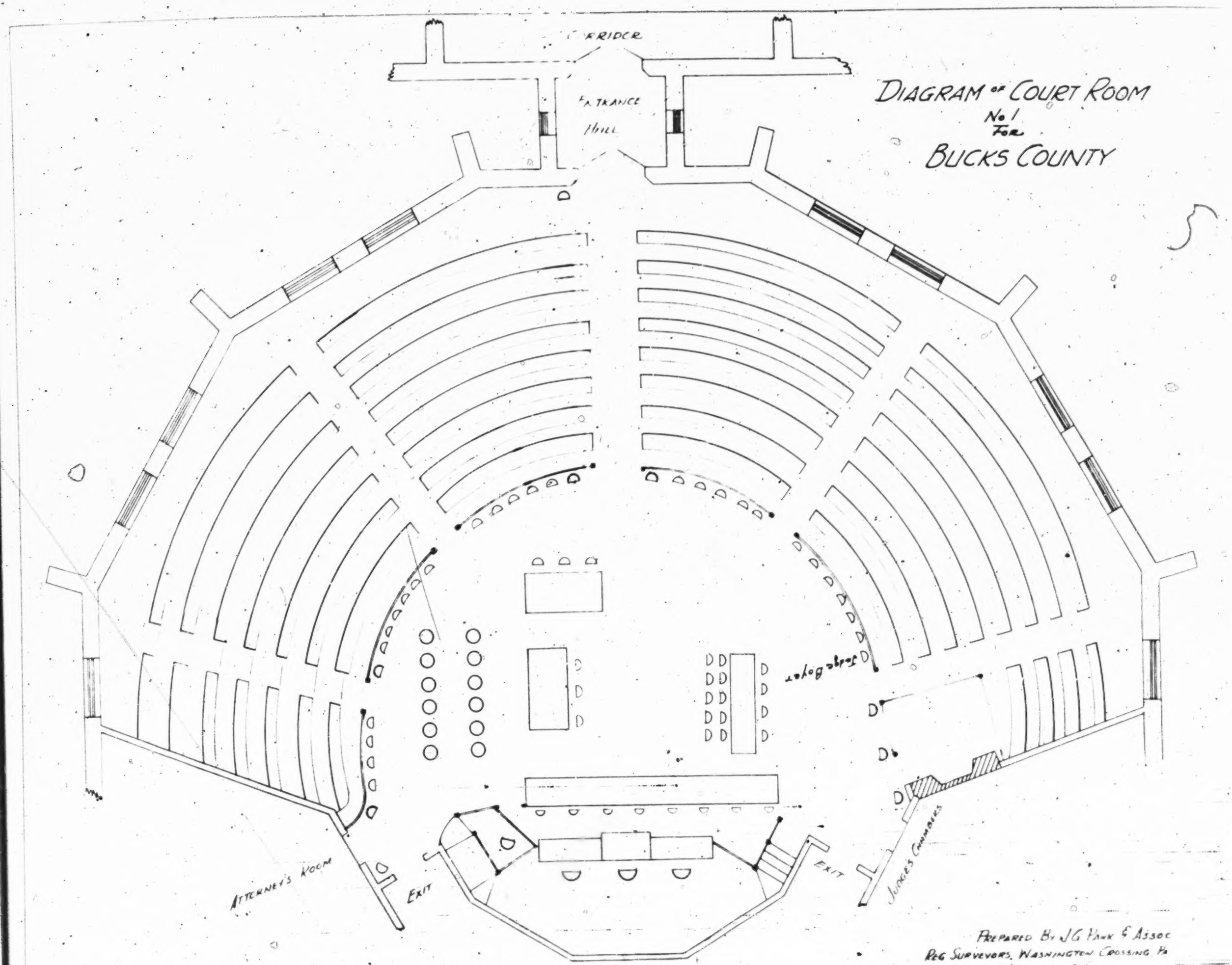
Relator's Exhibit No. 123(E)

service the staff of WBUX constructed two complete control rooms, studios and news rooms at Quakertown and Doylestown so that the finest in radio entertainment would be available to its radio audience.

Both studios are not utilized simultaneously. When the programs are originating at one studio, the other will be available to the public for inspection, for auditions of new talent and entertainment, or for rehearsals of a group which is to appear over WBUX.

(Italics supplied)

Relator's Exhibit No. 135 (113a)



Respondents' Exhibit No. 5

(b).

RESPONDENTS' EXHIBITS.

RESPONDENTS' EXHIBIT NO. 5.

CERTIFICATE OF JUDGE HIRAM H. KELLER.

TO WHOM IT MAY CONCERN:

In response to the request by the attorneys for the Commonwealth that the Trial Judge in the case of Commonwealth v. David Darcy, in the Court of Oyer and Terminer and General Jail Delivery of Bucks County, certify or make affidavit as to the conduct of said trial, the undersigned, being duly sworn according to law, deposes and says:

1. He has been a judge of the several courts of Bucks County since March 26, 1929 and President Judge thereof since April 30, 1930.

2. He was assisted by the late Honorable Calvin S. Boyer, as additional law judge from June 21, 1930 until July —, 1949, and by the Honorable Edward G. Biester since August 16, 1949.

Respondents' Exhibit No. 5

3. Honorable Edward G. Biester was district attorney of Bucks County from the first Monday of January 1938 until August 16, 1949 and, as such, prosecuted and conducted the trial in the case of Commonwealth v. David Darcy, as well as the cases of Commonwealth v. Harold Foster, Harry Zietz and Felix Capone, who were jointly charged with the said David Darcy in Bill of Indictment #37, February Sessions, 1948, with having, on the 22d day of December 1947, within the County of Bucks, unlawfully and feloniously killed and murdered one William Kelly.

4. In the prosecution of the aforesaid trials, the said Edward G. Biester was assisted by Willard S. Curtin, assistant district attorney.

5. David Darcy and his three co-defendants were jointly indicted for Murder on February 10, 1948. Darcy and Capone, respectively, petitioned the court for a severance of their trials, which was granted.

6. Foster and Zietz were tried jointly at the May Sessions of Criminal Court, 1948, to wit: from May 24th to June 4th, 1948, inclusive, before a jury, with Honorable Calvin S. Boyer, presiding.

7. David Darcy was separately tried before a jury, with the undersigned sitting as the Trial Judge, during the week following the trial of Foster and Zietz, to wit: from June 7th to 14th, 1948, inclusive.

8. The said David Darcy was represented throughout the trial by the late Webster S. Achey, Esq., and William M. Power, Esq., as his assistant. The said attorneys were not

Respondents' Exhibit No. 5

appointed by the Court to represent the said defendant, but were employed by a relative of Darcy on his behalf.

9. Webster S. Achey, Esq., now deceased, was one of the ablest and foremost active trial lawyers of Bucks County and his ability as such was recognized throughout the eastern section of Pennsylvania. He was formerly Assistant United States District Attorney for the Eastern District of Pennsylvania. His associate, William M. Power, Esq., was an assistant in Mr. Achey's office, and while a young man with less experience, he was, nevertheless, a very good trial lawyer.

10. A venire for one hundred and twenty jurors was called for the first week of May Sessions Trial Court commencing May 24, 1948. The one hundred and twenty jurors called for said week commencing May 24, 1948, together with two special venires comprised, exclusively, the panel from which the jury was selected to try the Foster-Zietz cases. A separate venire was issued summoning one hundred and twenty jurors for the week commencing June 1, 1948. When it became apparent to the Court, during the week of May 24, 1948, that the Foster-Zietz trial could not be completed within that week, the Court directed the Sheriff's office to notify, verbally, the one hundred and twenty jurors who had been summoned to appear for the week commencing June 1, 1948 to appear one week later, to wit: on June 7, 1948.

11. Of the one hundred and twenty jurors summoned to appear for the week commencing June 1, 1948 and who were subsequently notified to appear on June 7, 1948 for the reasons above set forth, eighty-one answered the summons and appeared on June 7, 1948. Thirty-nine of those

summoned were excused by the Court for various reasons, some of them had removed from the county, others were excused because of illness or physical disability, several for urgent business reasons and also several women were excused who had small children at home with no one to care for them.

12. At the outset of the drawing of the trial jury, objection was made by Mr. Achey, as attorney for Darcy, because only eighty-one jurors appeared. We overruled this objection and it developed that the Commonwealth and the defendant were able to select the fourteen jurors out of the eighty-one jurors responding.

13. Prior to the selection of the jurors in the trial of David Darcy, the entire panel of the jurors was detained in a room separate from the court room and, as each juror was called, he was brought into the court room where he was carefully examined and cross-examined on his voir dire by both the district attorney and the defense counsel, in order that the defendant might be tried by a jury free of bias, prejudice or preconceived opinion regarding the guilt or innocence of the accused and, at the same time, not be bound by any prior conscientious scruples against the imposition of the death penalty for murder in the first degree, in the event the facts and law warranted such a verdict.

14. In the selection of the jury in the Darcy panel, twenty-five were challenged for cause by the Commonwealth and thirteen by the defense; seven were peremptorily challenged by the Commonwealth and eleven by the defense; eleven were excused by the Court for various reasons, which were regarded as satisfactory and sufficient, while the remaining fourteen were accepted, sworn and seated.

Respondents' Exhibit No. 5

15. None of the jurors who were accepted and who served on the Darcy trial, so far as this affiant has any knowledge or so far as appeared from any of the questions propounded to them on their voir dire, appeared at the Court House on June 1, 1948, or were present at any of the sessions in the Court House throughout the trial of the Foster-Zietz cases. The jurors who ultimately tried the Darcy case were all selected from the panel summoned to appear on June 1, 1948 but who did not appear until June 7, 1948, for the reasons hereinabove set forth.

16. The trial was held in the main court room with seating capacity of approximately five hundred persons. The attendance at the Darcy trial was surprisingly small, in number, and at no time throughout the trial was the court room more than partially filled.

17. The trial was conducted by both the district attorney and by the attorneys for the defendant in a calm, dignified and orderly manner. There were no incidents, unusual occurrences or disturbances of any kind whatsoever that interferred therewith and, in their arguments, both the district attorney, and counsel for the defense, refrained from any emotional appeal to the jury.

18. At no time during the trial, or afterward, were there any emotional outbursts, displays of excitement, indication of prejudice against the defendant, or public demonstrations whatsoever, in the court room or any rooms adjacent thereto. Said trial was completely free of any hysteria. On the contrary, the spectators and other persons present were quiet, well-behaved, attentive and apparently interested in the proceedings.

19. Throughout the trial, the jury was in charge of four competent tipstaves, two men and two women, one of the latter being now deceased, and every precaution was exercised to insure and protect their insulation against being influenced in their verdict in any other manner or by any other means than the evidence and the law pertaining thereto. They were not permitted to talk to any person who was not a member of their jury; they were warned against discussing the case among themselves; and they were not permitted to listen to radio news broadcasts or to read any newspapers containing articles about the trial.

20. During the Darcy trial, the Honorable Calvin S. Boyer, the additional law judge, occasionally joined the undersigned and sat with him at the beginning of the several sessions of court devoted to the trial of the case, for the purpose of transacting miscellaneous business, after which he withdrew when the case was in progress. On several occasions, however, Judge Boyer remained for brief periods while evidence was presented. On one of these occasions, the undersigned conferred with Judge Boyer upon a difficult question of law as to the admissibility of certain evidence introduced by the district attorney, to which defendant's counsel, Mr. Achey, objected, in view of a recent amending Act of Assembly. A side bar conference before the Judge's bench was called, at which time the question was discussed between the undersigned and the defendant's counsel, Mr. Achey, during which Judge Boyer made certain comments. Mr. Achey objected to Judge Boyer taking part therein, whereupon Judge Boyer expressed his opinion that the judges had the right to confer without being obliged to get consent of defense counsel (N. T. p. 831) and withdrew from the bench, and thereafter did not rejoin

the undersigned on the bench during the remainder of the trial.

21. The foregoing conference held at side bar was in low tones of voice and completely inaudible to any person on the jury or the alternates who were trying the Darcy case, and any statements that may have been made at this side bar conference were unheard, unknown and never called to the attention of the jury.

22. At no other time, during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the undersigned in the trial of this case.

23. Although the undersigned took no part in the trial of Commonwealth v. Harold Foster and Harry Zietz before Judge Boyer, during the week prior to the trial of David Darcy, he sat in the court room on several occasions during said trial, at which time the same conditions prevailed as in the Darcy trial, in that it was quiet, orderly, and free from any disturbance, displays of excitement, prejudice, or evidence of any emotional outbursts or hysteria whatsoever.

24. Although the proceedings of both of the trials of Harold Foster and Harry Zietz and that of David Darcy were publicized through the local and county newspapers as well as Philadelphia, Trenton, and possibly some other newspapers, these reports were read and received as a matter of news by the residents of the county, and the undersigned, a resident of Doylestown, neither heard nor saw any manifestations of hysteria or prejudice having swept the town as the result of these newspaper stories. Further-

Respondents' Exhibit No. 5

more, in view of their answers under oath during their voir dire examination, the undersigned is convinced that the jurors selected had not been influenced by any newspaper stories, radio or other news reports or by any manifestations of prejudice or hysteria against the defendant.

/s/ Hiram H. Keller
Hiram H. Keller

Sworn and subscribed to
before me this 15th day
of March, 1954.
/s/ Mary H. Dunn
Deputy Clerk of Quarter Sessions

Excerpts from Transcript of Trial of Commonwealth vs. David Darcy, June 7, 1948

IV.

EXCERPTS FROM TRANSCRIPT OF TRIAL OF COMMONWEALTH vs. DAVID DARCY, JUNE 7, 1948.

(1).

VOIR DIRE EXAMINATION OF JURORS.

(a).

HARRY T. WESTLAKE.

(RELATOR'S EXHIBIT NO. 5A).

(N.T. 96).

HARRY T. WESTLAKE, sworn.

BY MR. ACHEY:

Q. Mr. Westlake, where do you live?
A. Sellersville.

* * *

Q. Have you read anything or heard anything about this case, which is the outgrowth of a robbery down at Feasterville in Bucks County on the night of December 22, 1947?

A. Yes, I have.

Q. Have you formed any opinion as to the guilt or innocence of this defendant, David Darcy?

A. Well, I think—yes, I have. It is one of the most cold-blooded murders I ever heard of.

MR. ACHEY: If Your Honor please, I ask ——

THE COURT: That will be stricken out.

MR. ACHEY: I object to that answer. It was uncalled for.

THE COURT: Objection sustained. Do not venture any opinion. Just answer the questions in the way they are asked of you.

MR. ACHEY: I would also ask for a mistrial by reason of that statement.

THE COURT: Motion denied.

MR. ACHEY: Exception.

THE COURT: Yes. The jurors already selected will totally disregard that remark or answer made by this juror.

MR. ACHEY: May I ask that this juror be dismissed?

THE COURT: He will be discharged for cause.

Excerpts from Transcript of Trial of Commonwealth vs. David Darcy, June 7, 1948

(b).

WILLIAM H. SLAUGHTER.

(RELATOR'S EXHIBIT NO. 5B).

(N.T. 218).

WILLIAM H. SLAUGHTER, sworn.

BY MR. ACHEY:

Q. Mr. Slaughter, you live in Doylestown?
A. Yes, sir.

* * *

Q. Were you in Court at any time during the last ten days that they were trying Zietz and Foster?
A. Off and on, yes.
Q. So that you heard the testimony in that case, didn't you?
A. Some of it.

* * *

Q. How many days did you say you were here in court during the trial of the other case?
A. Oh, several days off and on.
Q. What is your condition of health?
A. Very good.

Excerpts from Transcript of Trial of Commonwealth vs. David Darcy, June 7, 1948

MR. ACHEY: If Your Honor please, I challenge the juror for cause, and ask that he be excused from the panel because of having sat in court during the other trial. The district attorney agrees.

MR. BIESTER: We have no objection to that, Your Honor.

THE COURT: I don't think it is a good excuse.

MR. BIESTER: We are not contending it is, but we don't think it is a good precedent.

THE COURT: If there is no objection we will excuse him.

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(2).

JUDGE CALVIN S. BOYER'S PARTICIPATION IN THE TRIAL.

(RELATOR'S EXHIBIT NO. 5E).

(N.T. 830).

MR. BIESTER: * * *

I propose to interrogate Lieutenant Hanlon in reference to this alleged confession in order to have it proven, and then offer it in evidence to guide the jury in fixing the

penalty, assuming that the jury returns a verdict of guilty of murder in the first degree. The contention of the Commonwealth is that the jury is entitled to know who the defendant is, and for that purpose we can show any records or confessions of crimes in which the defendant is implicated.

MR. ACHEY: I object to the offer first, because the defendant not having appeared on the stand or testified or any evidence having been introduced in his behalf it is incompetent under the provisions of the Act of 1947, No. 505, which amends the Act of 1911, which lays down the rules effecting the right of the Commonwealth to submit evidence of commission of other crimes.

JUDGE BOYER: That applies only to cross-examination.

MR. ACHEY: I object to Judge Boyer sitting in on this case. I don't mind trying against one Judge ——

JUDGE BOYER: The Judges reserve the right to confer without being obliged to get the consent of defense counsel.

MR. ACHEY: In view of the statement which Judge Boyer made to the jury in the trial of Foster and Zietz, which was tried last week, I submit that he has disqualified himself from sitting in on this case, and it is prejudicial to this defendant.

My objection, further, to the offer, is that the evidence of the commission of other crimes is not permissible in this particular case because it is restricted by the amendment of the Act in 1947.

Excerpts from Transcript of Trial of Commonwealth vs. David Darcy, June 7, 1948

THE COURT: The objection is overruled. Exception.

(Exception noted for defendant.)

* * *

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(3).

JUDGE HIRAM H. KELLER'S CHARGE AND OBJECTION OF DISTRICT ATTORNEY EDWARD G. BIESTER.

(RELATOR'S EXHIBIT 5E).

(N.T. 864, 895, 903 and 905).

Ladies and gentlemen of the jury. This has been a rather lengthy trial. This was made necessary because, as it must be obvious to you, of the nature and importance of the case and the large number of witnesses who have testified. I have noted with satisfaction the patience you have exhibited throughout this trial and the careful and undivided attention you have given to the presentation of the testimony. We have now arrived at the point where the case is about to be submitted to you for your determination as to the guilt or innocence of the defendant under this indictment with which he stands charged.

* * *

Excerpts from Transcript of Trial of Commonwealth vs. David Darcy, June 7, 1948.

Again, this defendant, like all defendants in a criminal case is entitled to the benefit of any reasonable doubt which may arise from the evidence. The presumption of innocence, as I have already told you, abides with the defendant until the Commonwealth have proved his guilt beyond a reasonable doubt.

By "reasonable doubt" is meant, as indicated by the term itself, a doubt which is reasonable, one that appeals to reasonable men and women, not such a doubt that is sought for or imagined to exist or conjured up in one's mind in order to avoid the discharge of an unpleasant duty, but it is a doubt which fairly and reasonably and honestly arises out of the evidence, or the lack of evidence, or from a conflict in the evidence, and presents itself, and is such as would becloud or confuse your judgment and prevent you from arriving at a satisfactory conclusion. It is more than a mere possible or conceivable doubt, because everything relating to human affairs and depending on oral testimony is open to some possible or imaginary doubt. A "reasonable doubt" is of a real, fair and substantial nature. It is such a doubt as would cause a careful, prudent person, before engaging in matters of importance to himself, to pause and hesitate before acting. If there is, in this case, such a doubt in your minds as to the defendant's guilt, it is your duty to give the benefit of it to the defendant and acquit him. But, if after having considered all of the evidence in this case, including the spoken testimony and surrounding circumstances, you have no such reasonable doubt of the defendant's guilt of the offense, as charged by this bill of indictment, then it is your duty, as the sworn jurors in this case, to render a verdict of guilty of the offense, as you may find the evidence warrants.

Now, in passing upon the question of reasonable doubt,

this may give rise to the question of credibility, which you may attach to the testimony of these witnesses. It is your duty to weigh the testimony of these witnesses as they have testified before you and determine what credibility you will attach to it. Furthermore, where there is any conflict in the evidence from the witnesses you should try to reconcile it if you can, but if you can not reconcile it then accept that which you believe to be the truth.

* * *

If, however, you should find that the robbery had been fully completed and abandoned, and that the fatal shot was not fired during the escape or flight from the robbery, then you will have to determine whether it was fired at Kelly with a wilful, deliberate and premeditated intent to kill him, while the defendant was acting in concert with the man who fired the shot. If you so find, it will be murder in the first degree.

If you should find it was not done to kill him but merely to injure him, then it would be murder in the second degree.

* * *

Members of the jury, we do not wish to be understood that we express any opinion as to what your verdict shall be or what, in the event of a verdict of guilty of murder in the first degree, what the penalty shall be. This is your problem and your duty as you may conclude from the evidence and the law as we have given it to you.

Have I overlooked anything? Are there any corrections to be made?

MR. ACHEY: Nothing for the defendant, your Honor.

Excerpts from Transcript of Trial of Commonwealth vs. David Darcy, June 7, 1948

THE COURT: Members of the jury, a word in conclusion. I have instructed you as to what I understand to be the law bearing upon all the questions that arise in this case, as well as the substance of the testimony bearing upon the shooting, as I recall it. I trust I have made myself clear and that I have succeeded in giving it to you so that you comprehend and understand it. What does it indicate to your minds as jurors?

I may add that in the rendition of your verdict, if you convict this defendant of murder in the first degree, then you will not only have to announce the verdict, but also to announce the punishment, what the punishment shall be.

MR. BIESTER: Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree.

THE COURT: I specifically stated it was completely abandoned in the case of flight or escape.

That becomes important only, members of the jury, if you are convinced beyond a reasonable doubt that this shooting of Kelly did not occur during the perpetration of a robbery.

MR. BIESTER: I am sorry, but I don't think that would be beyond a reasonable doubt, that it would be on the preponderance of the evidence that it was during the commission of a robbery. I think your Honor inadvertently said that they would have to believe that beyond a reasonable doubt that it was not.

THE COURT: If I did, that will be withdrawn.

MR. ACHEY: I ask for an exception, a general exception of the charge of the Court.

THE COURT: Exception will be allowed.

(Exception noted for defendant.)

THE COURT: Members of the jury, you will now retire.

* * *

V.

REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

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(1).

RELATOR'S REQUEST.

In accordance with the order entered by this Court under date of November 10, 1954, the Relator submits the following requests for findings of fact and conclusions of law.

Relator respectfully requests the Court to make the following:

FINDINGS OF FACT.

1. That the relator and three companions, Foster, Zeitz, and Capone, on December 22, 1947, engaged in the armed robbery of the Feasterville Tavern near Doylestown in Bucks County, Pennsylvania, and that while the four of them were fleeing in an automobile from the scene of the robbery, a bystander, Kelly, was shot and killed by Zeitz.

Newspaper Publicity:

2. That the newspapers in Bucks County by their accounts of the crime and of the Foster-Zeitz trial that preceded the trial of the relator herein rendered impossible the impaneling of a fair and impartial jury.

3. That immediately following the crime the four leading newspapers of Bucks County—"Doylestown Daily Intelligencer", the "Bristol Daily Courier", the "Newtown Enterprise" and the "Quakertown Free Press", by their articles and editorials dictated the out of court campaign to prejudice the citizens of Bucks County against such defendants and to demand the death penalty for said defendants.

4. That the population of Bucks County during 1947 and 1948 was 107,715 (Rel. Ex. 124, Pennsylvania Manual 1947-1948, R. 375).

5. That the "Doylestown Daily Intelligencer" with its registered office in the Borough of Doylestown, Bucks County, Pennsylvania, during 1948 had a circulation of 5,329 (193, 226-227). Its circulation is principally in Doylestown

and Newtown in the center of Bucks County, although it is widely distributed throughout the county (194).

6. That the "Bristol Daily Courier" is a daily newspaper located in Bristol, Bucks County, Pennsylvania, which during 1948 had an average circulation of 5,397 (265, 372). This newspaper is circulated in lower Bucks County (370), particularly in the municipality of Morrisville, Langhorne, Penndel, Bristol and Bensalen (371). During the period involved the "Bristol Daily Courier" received its news coverage oft he Feasterville Tavern holdup, as well as of the other Foster-Zeitz trial and of the Darcy trial, from the "Doylestown Daily Intelligencer" (368-369, 371).

7. That the "Newton Enterprise" is a weekly newspaper published in Newtown, Bucks County, Pennsylvania, and during 1948 had a circulation of 1,972, all within a radius of five miles of Newtown (258-259).

8. That the "Quakertown Free Press" is a weekly newspaper published in Quakertown in the northern section of Bucks County (373), and during 1948 had an average circulation of approximately 5,000, principally within a 25 mile radius of Quakertown (374).

9. That the said newspapers had a widespread circulation throughout all sections of Bucks County. These newspapers were reached and were read by most of the citizens of said county.

10. That the out of court campaign carried on by these newspapers to assure the death penalty for the relator, as well as for the other defendants, commenced immediately following the homicide and grew in intensity. Every detail

of the passion-arousing evidence of the Feasterville Tavern murder was reported by the press in many highly prejudicial articles and editorials:

(a) The "Doylestown Daily Intelligencer" issue of Tuesday, December 23, 1947 (Rel. Exs. 12-13), giving a vivid detailed account of the holdup under the heading "Bandits Shoot 3 Men in Holdup at Two Taprooms", and characterized the defendants as bandits "terrorizing a wide suburban area", including Feasterville and Penndel in Bucks County.

(b) The "Doylestown Daily Intelligencer" issue of December 24, 1947 (Rel. Exs. 14-15), under the heading "Bandits Admit Shooting 5 Persons in Holdups" stated that Bucks County authorities including State Police of Langhorne Sub-station were assisting in the checkup of the series of tavern robberies in the Bucks and Philadelphia Counties' area by a quartet of *trigger happy* youths. The article gave another detailed report of the activities of the defendants and quoted the "leader" as boastful.

(c) The "Doylestown Daily Intelligencer" issue of December 26, 1947 (Rel. Exs. 16-17), under the heading "Murder Now Faces the Four Bandits" in a sub-heading referred to the fact that the "Dead Man Was Shot On Outside of Feasterville Inn When Bandits Fled After Shooting Two Other Men *Callously* During the Holdup." Under subheading "Feeling Runs High" it is stated:

> "The general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the youthful bandits to trial, and that it is 'a break' for society at large to have the trials in Bucks County rather than in Philadelphia."

(d) The "Doylestown Daily Intelligencer" issue of Saturday, December 27, 1947 (Rel. Exs. 18-19), under the heading "District Attorney Is Investigating Murder", again repeated the details of the crime and referred to the prosecution of "Philadelphia's Four Young 'Trigger Happy' Bandits".

(e) The same issue of the "Doylestown Daily Intelligencer" of December 27, 1947, contained the following editorial (Rel. Ex. 20):

FAST POLICE WORK

THE ROUNDING UP of the young gunmen who robbed the Feasterville and Penndel safes, and admitted many other robberies, is something for which we can thank the police of the county and Philadelphia.

What the public and the police will be watching closely is what is done to these potential killers when they come before the bar of justice.

One of the victims of the callous shooting has since died.

Something else that is particularly worth while remembering is the statement of one of the witnesses that one of the young gunmen remarked that it was lucky that no State Police were on the scene, because they also would have been shot.

When we stop to consider the number of policemen who have been killed by trigger-happy bandits, it is not difficult to believe that the gangster meant what he said.

We have always wondered why the police so often take chances with wanted men who are known to be gun-toters and potential killers.

It is especially surprising in view of the miscarriage of justice in Philadelphia recently * * * when a jury

predominantly made up of women, gave the killer of two cops life imprisonment instead of the electric chair, especially in view of the vicious record of the killer.

(f) The "Doylestown Daily Intelligencer" issue of Monday, December 29, 1947 (Rel. Ex. 21), under the heading "Murder Victim Funeral Held Last Saturday" referred to the murder of Kelly, popular citizen of Trevose area. This article again repeated all the details of the crime and referred to Kelly as the innocent victim of four "trigger happy bandits".

(g) The "Doylestown Daily Intelligencer" issue of Wednesday, December 31, 1947 (Rel. Ex. 22), contained a passion-arousing editorial headed "Errors of Jurors" and referred to the "Criticism of the Inefficiency of Jurors", and to the fact that "Courts very frankly excoriated juries for acquitting persons when the evidence was regarded as ample by the Judges". The editorial stressed that particularly in murder cases "Juries frequently rendered verdicts that it is difficult to explain".

(h) The "Newtown Enterprise" weekly issue of January 1, 1948 (Rel. Ex. 107-108), under the heading "Easy Xmas Money Was Bandits Aim" referred to the "Four Philadelphia Bandits Who Shot Up Two Taprooms in Lower Bucks County" and gave a detailed and passion-arousing report of the holdup.

(i) The "Doylestown Daily Intelligencer" of January 5, 1948 (Rel. Exs. 23-24), under the heading "Four Held For Murder" referred to four youthful Philadelphians who had been held on the charge of murder.

(j) The "Doylestown Daily Intelligencer" issue of Friday, January 16, 1948, under the column "The Gossiper" (Rel. Ex. 25) on the editorial page, made veiled, if not direct, reference to the problem of juvenile delinquency, and stressed that (if) "courts and jurors were to dispense with a lot of sentimentality about criminals * * * the general public would not face so many horrible crimes if horrified newspaper readers".

(k) The "Doylestown Daily Intelligencer" of Friday, January 16, 1948, under the column "We Notice" (Rel. Ex. 26), called the readers' attention to the fact "That it takes several hours daily just to give the four young men, charged with murder and now in the county prison their 'daily constitutional' ", and that "they also take their showers under the vigilant scrutiny of a prison guard".

(l) The "Doylestown Daily Intelligencer" issue of January 21, 1948, under the column "The Gossiper" on the editorial page (Rel. Ex. 27), stated that "Crime is a one-way street; the Street of Regret", and criticized the assertion that some gangsters had fine parents who endeavored to give them a proper bringing up, citing the case of the notorious gangster "Dutch Schultz".

(m) The "Doylestown Daily Intelligencer" issue of Tuesday, January 27, 1948 (Rel. Ex. 28-29), under the heading "Coroner's Jury Acts in Kelly's Slaying" again refreshed the readers with the details of the Kelly murder.

(n) The "Doylestown Daily Intelligencer" issue of Monday, February 2, 1948 (Rel. Ex. 30), referred to Bucks County citizens who had been "Called as grand jurors" on the editorial page of the same issue (Rel. Ex. 31) under

the heading "You'll Be the Next", referred to the current gruesome story appearing in the Metropolitan newspapers describing the brutal beating of aged men and women on the streets or in their shops by holdup men. The editorial stressed that "If juries and the courts will make examples of these cowardly enemies of society, there will be fewer of their assaults * * * it would be lamentable if citizens were forced to take the punishment of them into their own hands."

(o) The "Doylestown Daily Intelligencer" issue of Tuesday, February 3, 1948 (Rel. Ex. 32-33), under the heading "Traverse Jurors Called" referred to the fact that the criminal court trials were scheduled for Monday, February 16, 1948.

(p) The "Doylestown Daily Intelligencer" issue of Friday, February 6, 1948 (Rel. Exs. 34-35), under the heading "Murder and Manslaughter Cases on Criminal List" that "One Murder case with four accused * * * scheduled for the February Term of Criminal Court among the total of 43 cases, (*makes*) *it one of the most important criminal sessions in a long time* * * *.*" The same issue contains an article "Less Power For Juries" under a Harrisburg dateline and discussed a Philadelphia judge's proposal to relieve juries of the power to fix penalties in cases involving first degree murder on the ground that jurors "do not know how to exercise it".

(q) The "Doylestown Daily Intelligencer" issue of Tuesday, February 10, 1948 (Rel. Exs. 36-37), under the heading "Four Youths Indicted For Feasterville Murder" again gave the passion-arousing details of the crime. The article stated: "Safety in the custody of four State Troopers from

the Doylestown Sub-station of State Police, four youthful Philadelphians charged with murder of an innocent bystander following a taproom holding up at Feasterville last December, were brought from the Bucks County prison to the courthouse * * *." Article referred to defendants as "trigger happy bandits". The article further stated that the four guarding troopers surrounded the four accused defendants at vantage points—and the sheriff, two deputy sheriffs and county detectives were also on hand.

(r) The "Doylestown Daily Intelligencer" issue of Wednesday, Febraury 11, 1948, contained an editorial and a comment under one of the columns both designed to arouse the passions of the readers. The editorial entitled "Enraged Citizens" (Rel. Ex. 38), condemned leniency by courts and jurors in dealing with criminals and stated that although "Mob Law Is Not the Kind We Want In This Country * * *", there were probably thousands of women who felt like cheering when they read that a convicted rapist who had been merely fined $25.00, had been tarred and feathered. Under the column "We Notice" (Rel. Ex. 39), reference was made to the fact "that one of the young men who was charged with murder in connection with the Feasterville shooting, maintains he can't read although he was in the 10th grade in a Philadelphia vocational school. A State Policeman asked 'can he count money', and the prisoner admitted 'it came naturally', but 'insisted he could only sign his name'."

(s) The "Doylestown Daily Intelligencer" issue of Monday, February 16, 1948 (Rel. Ex. 40-41), carried the front page headline "Police Connected Six Bandits Arrested Here To the Number of Robberies and Holdups. * * * They also know members of the boy-murder gang. The article re-

ferred to the arrest of another Philadelphia robbery gang of six young bandits by two alert Doylestown police officers. The article referred to the police having learned several of the bandits were acquainted with the Philadelphia boy-murder gang that is now in the Bucks County prison awaiting trial on a murder charge. Several of the accused asked about their friends as soon as they arrived at the Bucks County Prison. The front page of the same issue stressed "Ten Young Problems" and stressed that "something to worry about in the way of juvenile delinquency has been furnished by ten Philadelphia boys now incarcerated in the Bucks County Prison" and that "Four of the Boys are Charged with Murder".

(t) That the "Doyleston Daily Intelligencer" issue of Wednesday, February 18, 1948 (Rel. Ex. 42), contained an editorial designed to arouse the passions of the readers against these defendants. Under the heading "Time For An Example", the editorial stated that "The Overflow of Philadelphia's Young Criminals Into Bucks County, Might, It Seems Reasonable To Believe, be discouraged if the crooks were given sentences which would be impressive and get headlines large enough to be seen and become impressive. Stiff sentences have had that effect before". The article referred to "These Criminal Forays Into the County". The editorial concluded with this thought, "Trying to Find Excuses for Enemies of Society Invites More Crimes".

(u) The "Doylestown Daily Intelligencer" issue of Monday, March 1, 1948 (Rel. Ex. 43-44), under the heading "Charged with Murder, Seeks Separate Trials", quoted the Judges Miriam K. Keller and Calvin S. Boyer as being critical of the relator's application for a separate trial on the ground that "Separate trials in these cases will mean that it may take a year to dispose of the cases."

(v) The "Doylestown Daily Intelligencer" issue of Wednesday, March 3, 1948 (Rel. Ex. 45) in another front page article reported that the Court had appointed counsel for Foster, one of the four youths waiting trial for the murder of William Kelly.

(w) The "Doylestown Daily Intelligencer" issue of Friday, April 2, 1948 (Rel. Ex. 46), contains under the heading "Guest Editorial" a reprint of an editorial that had appeared in the Philadelphia Inquirer, entitled "Mild Sentence For Murder".

(x) The "Doylestown Daily Intelligencer" issue of Saturday, April 3, 1948 (Rel. Ex. 47), under the column "The Gossiper" in commenting upon the light sentences given to drunken drivers by the courts, again was aimed at arousing the passion of the readers.

(y) The "Doylestown Daily Intelligencer" issue of Saturday, April 17, 1948 (Rel. Ex. 48), contained an editorial headed "If 'sob sisters' Laid Off" and quoted Judge Harry S. McDevitt, of Philadelphia as telling three holdup men whom he had sentenced to from ten to 30 years in the Eastern Penitentiary that "You wise guys start out with guns and usually wind up in the electric chair". The editorial commented that "Unfortunately * * * there still are Judges and Pardon Boards not yet convinced that thugs of that type should not be given an early opportunity to prey on the public. It seems to be time to stop making a guinea pigs of the law abiding members of society".

(z). The "Doylestown Daily Intelligencer" issue of Friday, May 7, 1948 (Rel. Ex. 49), contained another editorial aimed at arousing the passions of the readers and securing

the death penalty. This editorial is entitled "Jurors Rebuked Again" and cites a jury as being criticized severely by a court for "its palpably unintelligent or soft-hearted decision in the case of a man accused of a murder of two policemen". The editorial further commented that "It makes it more and more apparent that untrained men and women not familiar with court rules or the proper weighing of evidence, are lacking in temperament or ability to serve efficiently".

(aa) The "Doylestown Daily Intelligencer" issue of Wednesday, May 12, 1948 (Rel. Ex. 50) called the readers' attention to the beginning of the May Term of Criminal Court scheduled for Monday, May 17, 1948.

(bb) The "Doylestown Daily Intelligencer" issue of Friday, May 14, 1948 (Rel. Exs. 51-52), under the heading "Four Murder and Four Manslaughter Trials Listed" stated that four murder cases were listed on the docket for the May Term of County Criminal Court scheduled to open the following Monday, but that only two would be tried during the approaching term, and that two others, Darcy and Capone, would be tried later.

(cc) The "Doylestown Daily Intelligencer" issue of Wednesday, May 19, 1948 (Rel. Ex. 53-54) in another front page article called the readers' attention to the scheduled first week of the May term of Criminal Court, under the article headed "May Criminal Term Jurors".

(dd) The "Quakertown Free Press" issue of Thursday, May 20, 1948 (Rel. Exs. 123(a)—123(b)) contained a front page article headed "JURORS NAMES DRAWN FOR MAY TERM OF COURT" Scheduled to begin on Monday, May 24, 1948.

11. The Bucks County newspapers carried full and complete coverage of the trial of Foster-Zeitz commenced on Monday May 24, 1948 and ended on Friday, June 4, 1948. Daily detailed accounts of the selection of the jury on voir dire examination and of the testimony during the trial were reported in the "Doylestown Daily Intelligencer" issues of that period (Rel. Exs. 55-56, 57-58, 59-60, 61-62, 63-64, 65-66, 67-68, 69, 70-71, 72-73, 74, 75-76, 77), and in the weekly issue of the Newtown Enterprise" for Thursday, June 3, 1948 (Rel. Exs. 109-110). The "Doylestown Daily Intelligencer" issue of Thursday, May 27, 1948 (Rel. Ex. 61), contained a front page photograph headed "Murder Defendants on the way to the Court", and showed defendants Foster-Zeitz handcuffed to police. The "Doylestown Daily Intelligencer" issue of Saturday May 29, 1948 (Rel. Ex. 65) contained a front page article headed "Heard Feasterville Bandits Say They Would Also Like To Have Shot Some Cops". The issue of Tuesday, June 1, 1948 (Rel. Ex. 67, 68) contained another front page article of the Foster-Zeitz trial headed "Why Did They Shoot Me? Murdered Man Asks After He Was Victim of Feasterville Shooting".

12. That the "Doylestown Daily Intelligencer" issue of Saturday, June 5, 1948 (Rel. Exs. 78-79) contains another front page article: "Judge Boyer Praises Jury For Verdict Condemning Two Killers To Electric Chair", and quoted Judge Boyer as stating "I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in in these days. The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decisions".

13. The "Doylestown Daily Intelligencer" issue of Monday, June 7, 1948 (Rel. Exs. 80-87), which was published and circulated before the selection of any juror, contained the front page article entitled "Up To Late Hour This A. M. No Juror Had Been Gotten For Darcy Murder Trial". The article referred to the relator, "Whose partners in crime * * * were found guilty last Friday and sentenced to die in the electric chair" as having gone on trial that morning in Judge Keller's court. The article referred to the defendants as a "trigger-happy gang".

Radio and Television:

14. That radio station WFIL located in Philadelphia, Pennsylvania, with a broadcast radius covering all of Bucks County (267-268, 272) as well as radio station WBUS, of Doylestown, Pennsylvania (272-273), carried news broadcasts both of the Feasterville holdup and apprehension of the defendants, as well as of the Foster-Zeitz and Darcy trials.

15. That television station WFILTV in Philadelphia, with a broadcast range covering the entire Bucks County, on January 21, 1948 run a film broadcast depicting Darcy and the other defendants and commented upon the details of the Feasterville holdup (Ex. 112, 267-272, 587-592).

Public Opinion:

16. Every detail of the passion-arousing crime was reported by the press in articles and editorials prior to the Feasterville-Zeitz trial and also during that trial. The Death—penalty verdict already dictated by the press prior to the Darcy trial was also reflected in the public opinion

generated by said newspaper articles and editorials and radio and television broadcasts.

17. That there was a widespread public sentiment in all sections of Bucks County that all the defendants involved in the Feasterville holdup should be sentenced to the death penalty. This public sentiment against the defendants permeated throughout the entire Bucks County (110-117, 146-165, 166-175, 239-246, 300-304, 415-430, 567-569).

18. That the public sentiment against the relator and the other defendants prior to the relator's trial was that the defendants "should be hanged, ought to be shot", "ought to be stamped out like bugs" (151), "should burn" (174, 178), "ought to be hanged" or "get the chair" (242), should be lynched, hanged or shot (304), should burn, (379), should get the "hot seat", or should be "taken out and shot or strung up" (420-421), and "did not deserve a trial" (568), but "should be strung up" (569).

19. That Knickerbocker Davis of Doylestown, Pennsylvania, a magazine writer and former war correspondent, who was interested in the problem of juvenile delinquency, after the Feasterville holdup on December 22, 1947 made an independent survey of public opinion of the crime in the Borough of Doylestown and its environs as far north as New Hope. The survey showed that 70% of the 100-150 persons interviewed by Mr. Davis were shocked and outraged by the crime and were of the opinion that the participants deserved the death penalty (419-422, 430).

20. That the public sentiment against the defendants was not only generated by the type of crime involved, but also by the fact that the participants were Philadelphia youths

who had entered Bucks County to commit the various crimes with which they were charged. Not only did the newspaper articles and editorials above designated make frequent references to the fact that the defendants were Philadelphians who had made "criminal forays" into Bucks County, but also the public sentiment generated by said newspaper articles and editorials reflected the public antagonism and indignation against the "outlanders" from Philadelphia (245, 303, 320-324, 379-380).

Magazine Article:

21. The publicity following the Feasterville holdup of December 22, 1947 was so widespread in scope and intense and passion-arousing in nature that it culminated in a magazine article entitled "*Kill-Crazy*" in the June 1948 issue of a popular sensational national magazine known as "Front Page Detective" (Ex. 136). That the article contained a detailed account of the holdup and murder, together with pictures of the relator and other defendants. This magazine was circulated and widely read throughout Bucks County (538-542, 550-556, 571-573, 582).

21a. That during relator's trial said magazine was seen being held up in the court room in the hands of spectators, who were pointing at the relator (541-542, 550-556, 571-573, 582).

Relisting of Darcy Trial:

22. That the "Doylestown Daily Intelligencer" issue of Monday, March 1, 1948 (Rel. Ex. 43-44) reported, in effect, that both Judges Hiram H. Keller and Calvin S. Boyer, were opposed to Petition for Severance asking for separate trial

in the cases of the relator and Capone. The article reported that both judges asked that the matter be heard in further detail that afternoon, "in an effort to have a combination trial if possible, covering all defendants." According to the article, the Court commented "Separate trials in these cases will mean that it may take a year to dispose of the cases."

23. That the relator had been granted a separate trial pursuant to the Pennsylvania Act of March 31, 1860, P. L. 427, Section 40, 19 P. S. Pa. Section 785, which provides that in case of felonious homicide that "* * * the parties charged shall have the right to demand separate trials * * *" The purpose of the Act of 1860 plainly was to afford a fair trial to one accused of such crime.

24. That the "Doylestown Daily Intelligencer" issue of Friday, May 14, 1948 (Rel. Ex. 51-52) reported that "4 other cases are listed on the docket for the May Term of County Criminal Court that opens next Monday, but only 2 will be tried during the approaching term." The "Doylestown Daily Intelligencer" issue of Monday, May 24, 1948 (Rel. Ex. 55-56) stated that "only two of defendants (Foster and Zeitz) charged with the murder (in the Feasterville Tavern murder case) will go on trial this term."

25. That neither the District Attorney nor the Assistant District Attorney repudiated the stories published by newspapers as a fact that the relator would be tried at the next term of court (791, 911-912).

26. That the "Doylestown Daily Intelligencer" issue of Friday, June 11, 1948 (Rel. Ex. 93) quotes the following excerpt from the Philadelphia newspaper column "So many trials are cluttering the Bucks County Criminal Docket that

Doylestown High School Graduates won't be able to hold their commencement exercises in the ancient court house. Instead they will be graduated outdoors." The rescheduling of the commencement exercises is indicative and corroborative of the fact that the trial of the relator was not originally scheduled to start at the May Term of the Bucks County Criminal Court.

27. That the commencement of the trial of the relator on Monday, June 7th, only three days, after the rendition of the jury verdict and the imposition of the death penalty in the Foster-Zeitz trial, especially after Judge Boyer's commendation of that jury for its verdict "condemning two killers to the electric chair" (Rel. Ex. 78), in effect deprived the relator of the separate trial theretofore granted to him by the Court.

Darcy Jury Panel Present in Court on June 1, 1948, During Foster-Zeitz Trial:

28. That the records of the Bucks County Criminal Court show that as of the May Term, 1948, the Court issued two venires to the Sheriff and Jury Commissioners of Bucks County, Pennsylvania, commanding the said Sheriff and Jury Commissioners to empanel the said Sheriff to summon two traverse juries in the Court of Quarter Sessions and Oyer and Terminer, each consisting of 120 qualified according to law, to make up the jury at the term thereof to be held at Doylestown to serve for the term commencing on May 24, 1948, and for the term commencing June 1, 1948 (Rel. Ex. 137(a)-137(d)).

29. That the first scheduled traverse jury reported on May 24, 1948 (Rel. Ex. 137(a)-137(b)). From this jury was selected the jurors who served on the Foster-Zeitz trial.

30. The records of the Bucks County Criminal Court indicate that the traverse jury selected to report on June 1, 1948, did so report on that date. Further, the records indicates under date of June 1, 1948, certain jurors were excused from the May Term of Criminal Court 1948 (Rel. Ex. 137(d)). That from this traverse jury were selected the jurors who served on the trial of the relator herein.

31. That the members of the jury panel who reported in the Bucks County Court House on June 1, 1948 were present in the Court House in which the Foster-Zeitz trial was in progress. Said jurors had the opportunity to attend and to hear the Foster-Zeitz trial.

Fixed Opinions Held by Many Members of Foster-Zeitz Jury Panel:

32. That the records of the Bucks County Criminal Court indicate that the original jury panel summoned to serve on the Foster-Zeitz trial was exhausted before a jury was selected (Rel. Ex. 10(a)-10(g)). The Court thereupon directed that a special venire be issued and that the Sheriff summon and return from the bystanders or from the county at large 50 qualified persons (Rel. Ex. 10(g)). The Sheriff complied with the said Order and summoned said additional 50 jurors (Rel. Ex. 10(b)). Thereafter the Court found that by reason of challenges and otherwise, both the original panel of 120 jurors and the additional panel of 50 jurors had been exhausted without a jury being selected. The Court thereupon issued another Order directing the Sheriff to summon from the bystanders or from the county 25 additional persons (Rel. Ex. 10(g)). 143 persons were examined before a jury of 12 jurors and 2 alternates was finally selected to serve on the Foster-Zeitz trial (Rel. Ex. 10(k)).

33. That the difficulty in the selection of a jury from the original panel that reported was due to the fact that the case had been highly publicized and that the public had prejudged the guilt of these defendants.

Judge Boyer's Participation in Relator's Trial:

34. Judge Calvin S. Boyer, from at least the date of the presentation of relator's Petition for Severance evinced his personal antagonism and hostility against all the defendants.

35. That the "Doylestown Daily Intelligencer" issue of Monday, March 1, 1948 (Rel. Ex. 43-44) quoted Judge Boyer and Judge Keller as commenting "Separate trials of these cases will mean it will take a year to dispose of the cases."

36. That the "Doylestown Daily Intelligencer" issue of Saturday, June 5, 1948 (Rel. Ex. 78-79) quotes Judge Boyer as praising the Foster-Zeitz jury for its verdict condemning "two killers to Electric Chair."

37. That the "Doylestown Daily Intelligencer" issue of Saturday, June 12, 1948 (Rel. Ex. 94-95) under the heading

"Judge Boyer Warns That Bucks County Is Tired Of Thieves From Phila.

"Court Warns Youth That County Intends to Do Something About It—Asks Defendant Whether He Wants to Get Into Position of Killers Who Were Sentenced to Electric Chair"

quotes Judge Boyer as asserting that "We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which

isn't being watched. * * * What business did you have to come up here in the first place?". Judge Boyer's comments were made in connection with the sentencing of an 18-year-old Philadelphian Robert White who had pleaded guilty to stealing a car radio. He further stated "We in Bucks County are tired of your Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it." The records of Bucks County Criminal Court indicate that, although Judge Keller did not participate in any phase of the Foster-Zeitz trial which had been presided over by Judge Boyer, that Judge Boyer actively participated together with Trial Judge Keller, in the trial of the relator herein.

38. During the trial of the relator, Judge Boyer appeared in the courtroom, together with Judge Keller, when the case was called for trial on the mornings of June 7, June 8, June 9, June 10, June 11, June 12 and June 14, 1948 (Rel. Ex. 115(c), 116, 276-277).

39. That Judge Boyer stated to Knickerbocker Davis during the Foster-Zeitz trial that he thought that the defendants were hardened and callous criminals (432).

39a. That during the course of the relator's trial, Judge Boyer, who had presided at the Foster-Zeitz trial, and had publicly congratulated and commended the jurors on their imposition of the death penalty in that case, appeared at different times in the courtroom. On two occasions he sat in a chair in the section reserved for attorneys where he could be plainly seen and observed by the jury (460-469, 491-497, 498, 518, 522, 524-526, 538, 573-575, 595, 610, 710, 767, 887-888, 925).

40. Judge Boyer, during the relator's trial, at the beginning of each session sat on the bench with Judge Keller. On certain occasions he remained throughout the session and on occasions he left and then returned to the bench. On the times when he sat on the bench with Judge Keller, he assisted and conferred with Judge Keller in the conduct of the trial of the relator and participated in various rulings, particularly regarding the admissibility of evidence (469, 480-481, 522-523, 573, 587, 594, 601-603, 607, 771, 886-887, 920-921).

41. That on the session held on Friday, June 11, Judge Boyer actively participated in the ruling on the admissibility of a joint confession made by all the defendants. The following colloquy occurred with reference to the objection of Mr. Achey, trial counsel for the relator, to the admissibility of said confession (Rel. Ex. 5; Transcript of Testimony in Darcy Trial, pages 830-831).

MR. ACHEY: I object to the offer first, because the defendant not having appeared on the stand or testified or any evidence having been introduced in his behalf it is incompetent under the provisions of the Act of 1947, No. 505, which amends the Act of 1911, which lays down the rules affecting the right of the commonwealth to submit evidence of commission of other crimes.

JUDGE BOYER: That applies only to cross-examination.

MR. ACHEY: I object to Judge Boyer sitting in on this case. I don't mind trying against one Judge ——

JUDGE BOYER: The Judges reserve the right to confer without being obliged to get the consent of defense counsel.

MR. ACHEY: In view of the statement which Judge Boyer made to the jury in the trial of Foster and Zietz,

which was tried last week, I submit that he has disqualified himself from sitting in on this case, and it is prejudicial to this defendant.

My objection, further, to the offer, is that the evidence of the commission of other crimes is not permissible in this particular case because it is restricted by the amendment of the Act in 1947.

THE COURT: The objection is overruled. Exception.

Judge Boyer's participation in the foregoing ruling was observable by both the spectators and jurors (460, 518, 523, 594, 603, 772-773, 785, 896-897, 923-924).

42. Judge Boyer sat as a spectator in the courtroom in the section reserved for attorneys during the evening session held on Friday, June 11, 1948, for the entire session which lasted about two to two and one half hours (468-469).

43. That on Monday, June 14, during Judge Keller's charge to the jury, Judge Boyer was seated in the section of courtroom reserved for attorneys. Next to him was seated District Attorney Biester. Both Judge Boyer and Mr. Biester were seated so that they were plainly observable by the jurors (462, 499, 524-525, 528-529, 530, 594-595, 610-611).

44. That towards the close of the Court's charge, Judge Keller inquired of counsel for the Commonwealth and for the defense whether he had overlooked anything and whether there were any corrections to be made (Darcy Transcript, Ex. 5, Court's Charge page 32). Mr. Achey, defense counsel, answered that he had nothing to add. The Court thereupon resumed its charge. At this point Judge

Boyer, who was seated next to District Attorney Biester handed Mr. Biester a note. Mr. Biester read the note then arose from his chair and approached the bench where Judge Keller was concluding his charge. Mr. Biester succeeded in attracting Judge Keller's attention and stated that "I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree".

The Court then stated:

> "THE COURT: I specifically stated it was completely abandoned in the case of flight or escape. That becomes important only, members of the jury, if you are convinced beyond a reasonable doubt that this shooting of Kelly did not occur during the perpetration of a robbery.
>
> MR. BIESTER: I am sorry, but I don't think that would be beyond a reasonable doubt, that it would be on the preponderance of the evidence that it was during the commission of a robbery. I think your Honor inadvertently said that they would have to believe that beyond a reasonable doubt that it was not.
>
> THE COURT: If I did, that will be withdrawn.
>
> MR. ACHEY: I ask for an exception, a general exception to the charge of the Court.
>
> THE COURT: Exception will be allowed."

45. That Judge Boyer's participation and assistance in the District Attorney's correction of Judge Keller's instruction to the jury was observable by both the spectators and jurors in the courtroom (463-467, 486-487, 498-504, 524-526, 530-536, 538, 594-599, 609-613).

46. That the aforesaid presence of Judge Boyer, during the relator's trial both when he sat on the bench with Judge Keller and also on occasions when he sat in the section reserved for attorneys on the Friday evening session, June 11, 1948, and the Monday, June 14 session, was observable by the jurors and was a constant reminder to them of the trial of Foster-Zietz and of Judge Boyer's praise to the jury in the Foster-Zietz trial for their services in having rendered a verdict of guilty with death penalties.

47. That Judge Boyer was adament in his intent to see that the death penalty was given the relator, as well as the other defendants involved in the Feasterville holdup, is expressed in the following editorial contained in the Doylestown Daily Intelligencer issue of Thursday, June 17, 1948 (Rel. Ex. 105):

RAUS MIT 'EM

JUDGE CALVIN S. BOYER'S warning to tough crooks from Philadelphia and other places to keep out of Bucks county or take the consequences * * * should be impressive * * * because recent juries of men and women convicted three trigger happy young holdup men involved in the killing of a respected resident of Feasterville, without provocation, and recommended their execution in the electric chair.

The warning has been given before, but not under such impressive circumstances.

At any rate the jurors in the Feasterville slaying case probably indicated the reaction of people in this county to be vicious lawlessness of a great many young crooks who have operated in the county.

Conviction of even murderers in the first degree with the death sentence have not been numerous in recent years * * * which should convince potential

bandits and killers that leniency on the part of jurors is not likely to be easy to get.

For a long time jurors or the court have made it clear that they wanted to give the young offenders every chance to show that they would reform * * * but the evidence appears to unmistakably indicate that Bucks countians have concluded that leniency has merely been taken as an indication of weakness. The conviction of the three young men for a wanton and unprovoked murder * * * and the imposition of the death sentence * * * together with Judge Boyer's warning * * * it is to be hoped will cause bandits and killers to steer clear of the county.

Getting tough has worked that way in other instances.

Increase in Intensity of Fixed Opinion of Jurors During Relator's Trial:

48. The atmosphere of prejudice and hysteria surrounding the Feasterville holdup grew in intensity and reached its climax during the selection of the jurors to serve on the relator's trial. One juror examined on voir dire examination, Harry T. Westlake, when asked whether he had formed an opinion as to the relator's guilt or innocence stated, in the presence of three other jurors who had already been selected for service, that "It is one of the most cold-blooded murders I ever heard of" (Darcy Testimony, Ex. 5, p. 97).

49. According to the record of the voir dire examination of prospective jurors in the Foster-Zietz trial, 142 jurors were examined on May 24, May 25, May 26 and May 27 before the jury was completed (Rel. Exs. 10(d)-10(k)). 80

jurors were examined on the voir dire examination in the relator's trial on June 7 and June 8, 1948 before the jury was completed. In short, a total of 222 jurors were examined on voir dire examination in both trials before the juries were completed.

50. The jurors on both the Foster-Zietz and Darcy panels were selected from all sections of Bucks County.

51. That of those jurors who were thus examined on their voir dire examination in the Foster-Zietz case and were asked the questions, 63% admitted that they had read pertinent newspaper articles, 40% admitted that they had discussed the case, and 20% admitted that they had fixed opinions.

52. That of those jurors who were examined on the voir dire examination in the relator's case and were asked the questions, 89% admitted that they had read pertinent newspaper articles, 50% admitted that they had discussed the case, and 30% admitted that they had fixed opinions. A compartive analysis of the voir dire examinations of the jurors in both cases shows a marked increase in intensity of public sentiment against the relator. There was a 26% increase in the number of jurors, who had been asked whether they read pertinent newspaper articles who admitted they had. There was a 10% increase in the number of jurors, who were asked whether they had discussed the case, who admitted that they had. There was a 10% increase in the number of jurors who were asked whether they had fixed opinions, who admitted that they had such fixed opinions.

53. In the relator's trial approximately one-third of the jurors called to try the relator, who were asked whether

they had fixed opinions stood up in open court and said that they had such fixed opinions derived from reading the newspapers and hearing the case discussed. An examination of the testimony taken on voir dire in the relator's trial reveals a remarkable increase in intensity and fixity of opinion; the crystalization of public sentiment against the relator was apparent.

CONCLUSION.

54. That the relator was tried in an atmosphere of hysteria and prejudice inasmuch as (a) the newspapers in Bucks County by their accounts of the crime and of the trials, including the Foster-Zeitz trial, had rendered the impaneling of a fair and impartial jury impossible, the relator having been put to his trial almost immediately after that of Foster-Zietz trial, and (b) Judge Boyer, who had presided at the earlier trial and who had already demonstrated prejudices against all the defendants and elsewhere in the courtroom during the relator's trial and had participated with Judge Keller in the consideration of the ruling adverse to the relator's position and had assisted the District Attorney in making a correction in Judge Keller's charge to the jury.

From the foregoing Findings of Fact, the Relator respectfully requests the Court to make the following

CONCLUSIONS OF LAW.

1. That the Relator was tried in an atmosphere of hysteria and prejudice.

2. That the newspapers in Bucks County by their accounts of the crime and of the trial, including that of Foster and Zeitz, rendered the impaneling of a fair and impartial jury impossible, especially since the Relator had been put to his trial almost immediately after the Foster and Zeitz jury had rendered its verdict of conviction and imposed the death penalties.

3. That Judge Boyer, who presided at the trial of Foster and Zeitz and had already demonstrated prejudice against all the defendants, appeared on the bench, together with Judge Keller, during the Relator's trial and also on two other occasions appeared as a spectator in the court room in the section reserved for attorneys.

4. That on the occasions when Judge Boyer appeared in the court room, either on the bench or in the reserved section, he was observable by the members of the jury trying the Relator.

5. That on the occasions when Judge Boyer sat on the bench with Judge Keller, Judge Boyer actively participated in the consideration of rulings on the admissibility of evidence.

6. That on the occasions when Judge Boyer sat as a spectator in the court room, he was seated next to District Attorney Biester. On one of said occasions, during Judge Keller's charge to the jury, he actively assisted District Attorney Biester in the prosecution of the Commonwealth's case by making a written suggestion and delivering it to the District Attorney, thereupon calling Judge Keller's attention to what he considered an error in the Trial Court's charge to the jury.

7. That approximately one-third of the jurors called to try the Relator, who were asked the question, stood up in open court and said they had fixed opinions derived from reading the newspapers and hearing the case discussed which they could not and would not change. The comparison of the voir dire examination of the jurors in the Foster and Zeitz trial and the Relator's trial reveals a remarkable increase in the fixity of opinion against the Relator.

8. That public opinion, generated by newspaper articles and by the public's discussion of the case, was that the Relator, as well as the other defendants, were guilty and should be given the death penalty.

9. That, although the Relator had been granted a severance, in fact he did not receive a separate trial.

10. By reason of the foregoing, the Relator did not have a fair and impartial trial as is contemplated and guaranteed by the Commonwealth's Constitution and the United States Constitution.

Respectfully submitted,

/s/ CHARLES J. MARGIOTTI,
CHARLES J. MARGIOTTI, Esq.,
Pittsburgh, Pa.,
/s/ J. DRESS PANNELL,
J. DRESS PANNELL, Esq.,
Harrisburg, Pa.;
Attorneys for the Relator.

(2).

RESPONDENTS' REQUEST.

1. On April 12, 1948, two separate venires issued to empanel and summon 120 persons for each venire as traverse jurors in the Courts of Quarter Sessions of the Peace and Oyer and Terminer and General Jail Delivery of Bucks County, Pennsylvania. Jurors for the first venire were summoned to appear May 24, 1948. The jurors for the second venire were summoned to appear June 1, 1948. There had previously been scheduled a regular term of Court of Quarter Sessions of the Peace and Oyer and Terminer and General Jail Delivery to commence on May 17, 1948, the first week thereof being set aside for the Grand Jury, to be followed by two or more weeks of traverse jury. Although traverse jurors summoned in both of the venires were subject to service from the date of their respective appearances to the end of the term of Court, it was the custom of the Courts of Bucks County, Pennsylvania, to summon one panel for the first week of jury trials and an entirely separate panel for the second week, the first week's panel being excused for the term at the conclusion of one week's service, except for any jurors engaged in the trial of a case not concluded by the end of the week.

2. Listed for trial at the May Term of Court, 1948, was Bill of Indictment No. 37, February Sessions, 1948—Commonwealth of Pennsylvania vs. Harold Foster, Harry Zietz, David Darcy and Felix Capone, 1st Count, Murder. Upon proper application, a severance was granted to David Darcy and Felix Capone. Several weeks prior to May 24, 1948,

the District Attorney notified counsel representing each Defendant that Harold Foster and Harry Zietz would first be tried together, and thereafter, as soon as the first trial was completed and the Court would sit, the case against David Darcy would commence. No objection was raised to this procedure by counsel for David Darcy, and no application for a continuance was filed by David Darcy's counsel.

3. On May 24, 1948, the Court, Hon. Calvin S. Boyer presiding as trial judge, proceeded to draw a jury and try the case against Harold Foster and Harry Zietz. A jury of twelve and two alternates was selected and sworn on May 26, 1948. None of the persons summoned as veniremen, or examined on voir dire, or sworn as jurors or alternates in the case against Harold Foster and Harry Zietz were the same as any of the 120 persons summoned to appear as veniremen on June 1, 1948. On Friday, June 4, 1948, at 1:25 P. M., the jury rendered a verdict of guilty of murder in the first degree and imposed the death penalty as to both Defendants, Harold Foster and Harry Zietz.

4. The panel of traverse jurors originally summoned to appear on June 1, 1948, did not appear in the Bucks County Court House until June 7, 1948. When it became obvious that the trial of Harold Foster and Harry Zietz would not be completed during the first week of trials, the Court directed the Sheriff of Bucks County to notify the persons summoned to appear on June 1, 1948, to appear on June 7, 1948. None of the jurors who were subsequently sworn as jurors or alternates to try the case of Commonwealth of Pennsylvania vs. David Darcy appeared or received pay for appearing on June 1, 1948, all of said persons first appearing and receiving pay for service on June 7, 1948. None of the jurors or alternates sworn to try the case against

David Darcy were present in Court during any of the trial of the case of Commonwealth of Pennsylvania vs. Harold Foster and Harry Zietz.

5. Of the panel of jurors originally summoned to appear on June 1, 1948 (later notified to first appear on June 7, 1948), eighty-one persons appeared. Thirty-nine of those summoned failed to appear due to return of "non-est" or otherwise excused by the Court on or prior to June 7, 1948. Objection was raised by counsel for David Darcy that only eighty-one of the one hundred twenty originally summoned appeared, but no other objection or challenge was made to the panel of jurors who appeared, prior to the examination of prospective jurors on voir dire.

6. The panel of eighty-one jurors who appeared on June 7, 1948, were removed from the Main Court Room to other rooms located on the floor above the Main Court Room. The jurors were then separately called into the Main Court Room and examined individually, as respective names were drawn by the Clerk of Courts. Any juror who was called and challenged was kept separate and apart from the rest of the jury panel, so that no juror had any knowledge of preceding voir dire examinations prior to being interrogated on voir dire.

7. A jury of twelve persons and two alternates was selected and sworn on June 8, 1948, after eighty jurors of the panel had been examined on voir dire. Counsel for defense took ten pre-emptory challenges, and the Commonwealth took eight pre-emptory challenges. Twenty-five persons were challenged because of conscientious objections to capital punishment. Eleven jurors were challenged because of fixed opinions of the case. The others were chal-

lenged or excused for various reasons, including physical disabilities, family necessity, and personal acquaintanceship with the District Attorney.

8. After the first juror, W. D. Pardoe, was accepted by both sides, a tipstaff, Clarence H. Dannenhower, was placed in charge of the juror. Thereafter, as jurors were selected they were kept with the other juror accepted, at all times entirely segregated and out of communication with all other persons, in charge of one or more tipstaves. The Court instructed the jurors selected that they were to talk to no one or allow anyone to talk to them, except among themselves and the tipstaves who were in charge of the jury. They were further advised not to discuss the case among themselves, until properly called upon to deliberate the case. These instructions were carried out fully by the jurors and the tipstaves.

9. At the time the jury was sworn, four tipstaves were placed in charge of the jury. They were Clarence H. Danenhower, Mrs. Ethel M. Van Sant, Gideon Gehman, and Mrs. Jessie Gwinner. The jury at all times throughout the trial was kept in a body separate and apart from all other persons and under the personal supervision and observation of the tipstaves. The jury was fed and lodged at the Doylestown Inn, a local hotel approximately two blocks from the Bucks County Court House. All clothing and articles of personal belongings were obtained for the jurors by the tipstaves telephoning to the homes of the respective jurors and requesting that the articles be delivered to the tipstaves. All belongings were personally searched by the tipstaves in the presence of the juror before being delivered

to the juror. No reading material of any kind was delivered to the jurors. The jurors heard no radio programs during the trial, read or saw no newspapers, magazines or other reading material, and viewed no television programs. The hotel rooms allotted to the jurors had no radios or television sets. The jurors ate at a separate table in the rear of the dining room of the Doylestown Inn. In the evenings a separate room was set aside for the jury, where they remained until time to retire. Jurors were instructed not to leave their rooms after retiring, but were not locked from the outside due to fire hazards. At the end of the corridor Tipstaff Danenhower occupied a hotel room; he kept his door open at night in order to be sure that no one left the rooms or that any persons entered the rooms.

10. The jury traveled between the Court House and the Doylestown Inn each session on foot, in a body, with tipstaves at the front, rear and on the sides of the jury. The jury always traveled in a close group. On several occasions the jury took short walks about Doylestown for necessary exercise. At no time did the jurors talk to any persons other than themselves or the tipstaves, nor did any persons seek to talk to them. The jury always entered and left the jury box and Court House through a rear corridor leading from the rear of the Court House directly into the main floor of the Court Room, a few feet from the respective seats of the jury. The corridor used by the jury was not generally used by the public. At no time was the jury taken through the front or main entrance to the Court House, or through or near any spectators or witnesses present in Court. At no time was the jury taken near or through any crowds or groups of persons, either inside or outside of the Court House.

11. The jurors neither heard nor saw anything whatsoever concerning the case from the time each was accepted as a juror until after the verdict was rendered and the jury polled and dismissed, except that which transpired in the Court Room during the trial proceedings, and the view of the locus of the offense under Court supervision.

12. The jurors saw no magazines, books, newspapers or other reading material during the course of the trial, except that which was introduced and received in evidence.

13. There were no public demonstrations of any kind during the course of the trial against the Defendant David Darcy or any of the other Defendants who had been jointly indicated with David Darcy. There were no outbursts or displays of mass or public emotion in the Court Room, the Court House, or the Borough or vicinity of Doylestown, Pennsylvania, during the course of the trial. There were no threatening gestures or menaces or attempts of violence toward David Darcy, defense counsel, or any of the jurors during the course of the trial, either in or out of the Court House.

14. The Court Room where all of the trial took place seats approximately six hundred persons. The Court Room was at no time during the trial more than approximately half full of spectators and witnesses. There were no more persons present in and about Doylestown than normal for a week of Criminal Trial Court. There were no disturbances of the public peace and quiet in the Borough of Doylestown at any time during the trial or period of time in which the trial took place.

15. The jurors heard no remarks of any spectators or witnesses in the Court Room or elsewhere, except such as was stated under oath by the witnesses on the stand and as appears in the Transcript of the Testimony of the trial.

16. No unusual precautions were taken or ordered to be taken to maintain order, either in the Court House or in the Borough of Doylestown or elsewhere in the County of Bucks during the trial. In the trial, certain Pennsylvania State Policemen, not in uniform, assisted the Sheriff's Office in guarding and conducting David Darcy from the Bucks County Prison to the Bucks County Court House. The only uniformed persons in the Court Room were approximately ten tipstaves, which was the usual number of persons on duty during criminal trials.

17. During the trial, David Darcy was lodged and fed at the Bucks County Prison, located approximately three blocks from the Bucks County Court House. He was transported between the Prison and the Court House by automobile in the direct custody of the Sheriff and Cpl. Harold Dando, Pennsylvania State Policeman in charge of the Doylestown sub-station. David Darcy entered and left the Court Room by the same door and corridor used by the jury. Cpl. Dando was not uniformed and carried a firearm concealed from public view. Shortly before the Court would convene David Darcy was brought into the Court Room and seated in a chair in front of the benches reserved for spectators and witnesses. The row immediately behind the seat of David Darcy, as customary in important trials, was kept blocked, so that spectators could not sit in the first row directly behind the Defendant. When the trial would be

about to proceed, David Darcy would move forward to defense counsel's table with his attorneys; the guarding officers remained in the chairs immediately in front of the spectators' benches. At no time were any threats, threatening gestures, menacing language or other improper conduct directed toward David Darcy, either in or outside of the Court House. At no time was David Darcy taken through or near any crowds or groups of persons. There were no crowds or large groups of persons congregated around any of the entrances or exits of the Court House or the Bucks County Prison or in the Vicinity. At no time during the period of the trial was there any more than normal traffic, both pedestrian and vehicular, on the streets or public thoroughfares and buildings in and about Doylestown.

18. Hon. Calvin S. Boyer, who had presided as Judge during the trial of Harold Foster and Harry Zietz, maintained his chambers and office in a room leading directly from the Main Court Room. During the course of the trial, as was the usual custom, at the opening of Court in the morning and in the afternoon both Judge Keller and Judge Boyer would go on the bench to receive any miscellaneous papers that attorneys wishes to present, both as to criminal and civil matters. The trial of David Darcy was before Hon. Hiram H. Keller, the President Judge of the Seventh Judicial District of Pennsylvania. When miscellaneous matters, if any, were concluded, the trial of David Darcy would proceed. On occasions, Judge Boyer would remain on the bench, beside Judge Keller, for varying lengths of time. Judge Boyer at no time, however, acted as a trial judge. He asked no questions of any witnesses, he made no remarks to counsel for either side in the hearing of the jury, and he

gave no instructions to the jury. On occasions, Judge Boyer left the bench to attend other matters.

19. While the trial against David Darcy was being heard before Hon. Hiram H. Keller in the Main Court Room, among other business taken up by Judge Boyer was the taking of testimony and sentencing on a plea of guilty of one Howard White. This took place in a separate Court Room located on the second floor of the Bucks County Court House, referred to as the "Grand Jury Room". None of the jurors sitting on the David Darcy case heard or were aware of anything concerning the sentencing of Mr. White or heard or were aware of any remarks Judge Boyer may have made in respect thereto, at least until after they had rendered the verdict and been dismissed by the Court. Any newspaper accounts of what transpired during the sentencing, whether the newspaper reports were accurate or not, were likewise unknown to the jury.

20. During the course of the trial, an objection was made by defense counsel to the admission of a certain Commonwealth exhibit (CX-71), the joint statement of David Darcy, Felix Capone, Harold Foster and Harry Zietz). A side-bar conference was then held between defense counsel, the District Attorney, and Judge Keller. Judge Boyer, who was present during the conference, stated: "That applies only to cross-examination." Mr. Achey, defense counsel, then stated: "I object to Judge Boyer sitting in this case. I don't mind trying against one Judge." Judge Boyer replied: "The Judges reserve the right to confer without being obliged to get consent of defense counsel." Thereafter, Judge Keller overruled the objection, and the trial pro-

ceeded. None of the jurors overheard any part of the side-bar conference. Judge Boyer remained on the bench for a short period of time afterward but thereafter left the bench and did not return or sit on the bench again at any time while the trial was actually in process. At no time during the trial did Judge Boyer take any active participation in the trial.

21. During the charge of the Court, the District Attorney sat with his assistant, Willard S. Curtin, in the front row of a group of chairs reserved for lawyers. Near the conclusion of the charge, Judge Keller asked counsel if there was anything to be stated. Defense counsel made no reply. The District Attorney arose and suggested orally that certain portions of the charge be clarified by Judge Keller, on a question of law. A short discussion took place between the District Attorney and Judge Keller, after which Judge Keller completed his charge. Nothing in writing was at that time handed to Judge Keller by the District Attorney. Judge Boyer did not sit on the bench during the charge.

22. At all times throughout the trial both Judge Boyer and Judge Keller wore street attire, the Court not being robed.

23. Judge Boyer occasionally sat on a chair a few feet outside of the doorway to his chambers, where he listened to the proceedings of the trial as a spectator. At no time did Judge Boyer sit at the Commonwealth's counsel table, or confer with or assist the District Attorney or his staff in the prosecution of the case or the presentation of evidence.

RESPONDENTS' REQUEST FOR CONCLUSIONS OF LAW.

1. This proceeding is, in substance, a suit against the Commonwealth of Pennsylvania.

2. The Commonwealth of Pennsylvania has not either expressly or impliedly consented to this suit.

3. The Eleventh Amendment of the Constitution of the United States is a bar to the entertainment of this proceeding by this Court.

4. Under our constitutional system it was never intended that the lower Federal courts or the judges thereof should review State court action by habeas corpus or otherwise.

5. This Court has no power, under the Constitution of the United States, to review the judgment of the Court of Oyer and Terminer of Bucks County, Pennsylvania, pursuant to which the applicant-relator is presently detained in the custody of the Commonwealth of Pennsylvania.

6. The applicant-relator has not exhausted available state corrective judicial process, and, hence, this Court has no power to entertain this proceeding.

7. The applicant-relator is not being detained in the custody of the Commonwealth of Pennsylvania in violation of the Fourteenth Amendment of the Constitution of the United States.

8. The rule to show cause should, therefore, be discharged.

the petition dismissed and the applicant-relator remanded into the custody of the Commonwealth of Pennsylvania.

Respectfully submitted,

/s/ DONALD W. VAN ARTSDALEN,
District Attorney of Bucks County,
/s/ RANDOLPH C. RYDER,
Deputy Attorney General,
/s/ FRANK P. TRUSCOTT,
Attorney General,
Counsel for Respondents.

VI.

OPINIONS OF UNITED STATES DISTRICT COURT.

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(1)

OPINION DENYING PETITION.

This case is here on remand,[1] a majority of the Court of Appeals having ruled that opportunity must be afforded relator to prove the allegations in his petition for habeas corpus, insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at his trial, including any issues raised by Judge Boyer's asserted visits to the court

[1] United States, ex rel., Darcy v. Handy, Warden, et al. (argued January 7, 1952; reargued December 1, 1952), 3 Cir. March 24, 1953, as amended March 28, 1953, 203 F. 2d 407. Rehearing denied April 29, 1953; cert. den. 346 U. S. 865, 74 S. Ct. 103, 98 L. Ed. 375 (October 26, 1953). Mandate received November 4, 1953.

room.[2] After a hearing was scheduled[3] respondent moved[4] to dismiss contending that the court lacked jurisdiction and judicial power to conduct the inquiry or to grant the writ. The motion is without merit. Similar questions were disposed of contrary to respondent's position in an opinion by Judge Goodrich speaking for the full court in United States, ex rel. Elliott v. Hendricks, June 2, 1954,[5] 213 F. 2d 922. See Id. at 929. "We cannot have any doubt, even were the question a new one, that the federal power is ample, under the Constitution, to authorize the use of habeas corpus procedure to test the question whether one confined under

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[2] Cf. opinion Maris, J., joined by Judges Goodrich and Staley, Id. 203 F. 2d at 420. We previously dismissed the petition because, in our judgment, its allegations were refuted by the record in the Pennsylvania courts. See United States, ex rel., Darcy v. Warden, et al., D. C. M. D. Pa., May 17, 1951, 97 F. Supp. 930, and see United States v. Hendricks, 3 Cir. 213 F. 2d 922 at 930, 931; Brown v. Allen, 1953, 344 U. S. 443, 457-458, 463, 73 S. Ct. 397-410, 97 L. Ed. 469; United States, ex rel., Smith v. Baldi, 1953, 344 U. S. 561, 569, 570, 73 S. Ct. 391, 97 L. Ed. 549. A majority of the Court of Appeals agreed (see 203 F. 2d 407, supra) that there was no merit in relator's allegation of incompetency of his trial counsel, see United States, ex rel., Thompson v. Dye, 3 Cir. March 26, 1953, 203 F. 2d 429, cert. den. May 18, 1953, 345 U. S. 960, 73 S. Ct. 946, 97 L. Ed. 1380 (cf. opinion of Chief Judge Biggs, joined in by McLaughlin, J., 203 F. 2d, supra, at 410).

[3] Conference January 22, 1954; hearing set for February 17, 1954; continued because of illness of Mr. Margiotti to March 9, 1954; Mr. Van Artsdalen engaged before Grand Jury to February 11, 1954.

Order March 5, 1954, to produce relator at hearing. Order November 5, 1953, staying execution of death penalty until court has acted upon and finally disposed of petition for writ of habeas corpus. Order March 12, 1954, striking jurors' letters from petition.

[4] March 4, 1954. The alleged violation of the XI Amendment, United States Constitution, was first raised in respondent's petition for certiorari; denied 346 U. S. 865. See Note 1, supra.

[5] Argued December 22, 1953. The Attorneys General of 40 states supported claim of the Attorney General of Pennsylvania of unconstitutionality. The United States Attorney General filed a brief contra.

state process is, in that confinement, deprived of his rights under the Constitution of the United States. Nor have we doubt that the power may be assigned to all the federal judiciary or part of it. If the authority of federal courts is to be more limited than that provided by the present statute, that limitation must be made by the Congress." And see Mr. Justice Reed in Brown v. Allen, supra, 344 U. S. at 460, 464, 478, 486, and Mr. Justice Frankfurter, Id. at 508, "Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. It has seen fit to give this court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims, by way of habeas corpus"? Id. 510, "Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted."

See Mr. Justice Black at p. 549 Id., "I agree with the Court that the District Court had habeas corpus jurisdiction * * * including power to release * * * if (the prisoner) is held as a * * * violation of constitutional rights. This I understand

to be a reaffirmance of the principle embodied in Moore v. Dempsey, 261 U. S. 86."[6]

Has the applicant met the burden of showing that he has exhausted the remedies available in the state courts within the meaning of 28 U. S. C. A. §2254, Darr v. Burford, 339 U. S. 200 at 218, 70 S. Ct. 587, 94 L. Ed. 761, Brown v. Allen, 344 U. S., supra at 448-450, 486, 487? Respondent argues that the Pennsylvania Supreme Court did not directly meet and dispose of the question of hysteria and prejudice. See Commonwealth, ex rel. Darcy v. Claudy, April 10, 1951, 367 Pa. 130, 79 A. 2d 785

The Court of Appeals, however, found contra. See opinion C. J. Biggs, 203 F. 2d, supra at 411, describing the opinion in 367 Pa. as "passing on every substantial ground alleged in the petition."[7] See and cf. Brown v. Allen, supra, 344 U. S. at 458; Smith v. Baldi February 9, 1953, 344 U. S. 561, 73 S. Ct. 391, 97 L. Ed. 9; Commonwealth, ex rel., Elliott v. Baldi, 373 Pa. 489, April 14, 1953, 96 A. 2d 122, cert. den. June 8, 1953, 345 U. S. 976, 73 S. Ct. 1125, 97 L. Ed. 1391.

A remedy may be exhausted by affirmative use thereof and failure therein or by inaction or failure to resort thereto.

Assuming arguendo there was some evidence of hysteria and prejudice before or at the trial, the law of Pennsylvania affords a number of methods of raising the question and spelling it out on the record and in the event of an adverse

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[6] See sentiments of Judge Goodrich, United States, ex rel., Smith v. Baldi, 3 Cir. 1951, 192 F. 2d 540, 543; Mr. Justice Jackson, Brown v. Allen, 344 U. S. at 532; Mr. Justice Reed, Darr v. Burford, 1950, 339 U. S. 200 at 217, 70 S. Ct. 587 at 597, 94 L. Ed. 761, and see Report Committee on Habeas Corpus of Judicial Conference of United States, July 16, 1954, supplement September 16, 1954, and recommended legislation. Report of Special Committee on Habeas Corpus to the Conference of Chief Justices, June 1953.

[7] As to Judges McLaughlin (see Id. 203 F. 2d 419), Kalodner and Hastie (at 420), Maris (at 420-428), Goodrich and Staley Id

decision reserving it for review on appeal to the Supreme Court of Pennsylvania and on certiorari to the United States Supreme Court. Pre-trial, by challenging the array, see Commonwealth v. Zell and Herr, 81 Pa. Super. Ct. 145 at 150, or by motion for continuance, Commonwealth v. Balles, 160 Pa. Super. Ct. 148, 150-151, 50 A. 2d 729, or change of venue, Commonwealth v. Karmendi, 328 Pa. 321, 339, 342, 195 A. 62. The Pennsylvania Supreme Court itself could upon proper showing remove the indictment to another county for trial, Commonwealth v. Ronemus, 205 Pa. 420, 54 A. 1095. At trial, by motion for withdrawal of juror, Commonwealth v. Mehlman, 163 Pa. Super. Ct. 534, 544, 63 A. 2d 400. Post-trial, by motion for new trial, Commonwealth v. Deni, 317 Pa. 289, 293, 176 A. 919. Finally, on appeal and on petition for certiorari to the United States Supreme Court.

No such question was suggested either before, during or after the trial. See Rel. Ex. Nos. 4, 5, 10, 115, 116, 137; the motion for a new trial and opinion denying same, he assignments of error and statements of question involved on appeal, see paper books Supreme Court of Pennsylvania, 362 Pa. St. 259-286; Commonwealth v. Darcy, May 26, 1949, 362 Pa. 249, 66 A. 2d 563, rehearing refused June 24, 1949.

The petition for certiorari (No. 96 Misc.), denied October 1949, 338 U. S. 862, 70 S. Ct. 96, 94 L. Ed. 528, raised only questions as to the jury view of the locus in quo and the charge of the court on presumptions from the use of a deadly weapon.

August 1, 1949, relator petitioned the Supreme Court of Pennsylvania for a writ of habeas corpus complaining that at the trial, over objection, the jury heard testimony as to offenses committed by defendant other than that named in the indictment. Petition denied without opinion August 12, 1949 (not reported); certiorari denied (No. 102 Misc.) October 23, 1949, 338 U. S. 862, 70 S. Ct. 96, 94 L. Ed. 528.

The question was not raised until after the relator failed in his attempt to have the Pennsylvania Board of Pardons commute his sentence to life imprisonment. (April 1950, denied May 5, 1950; application for reargument granted June 1950, continued to March 20, 1951, rejected March 21, 1951; again on March 29, 1951, rehearing denied March 30, 1951). April 2, 1951, relator's petition to the Supreme Court of Pennsylvania for certiorari to the Court of Oyer and Terminer of Bucks County, and for reargument nunc pro tunc, claimed denial of due process of law alleging that his trial counsel did not permit him to testify at his trial (cf. opinion Biggs, J., 203 F. 2d at 410, Maris, J. at 420); did not produce witnesses as to his background, good behavior, character or reputation although they were available; the proximity of the two trials; jurors' letters and opinions; hysteria; Judge Boyer's commendation and participation; and failure to continue the case. Denied without opinion April 3, 1951 (No. 429 Misc. Docket No. 9). Relator did not seek certiorari from the United States Supreme Court.

April 3, 1951, the present petition was filed in the district court. We withheld ruling thereon to afford relator an opportunity to seek a writ of habeas corpus from the Supreme Court of Pennsylvania, raising the precise questions and, if he failed therein, to seek certiorari from the United States Supreme Court. The petition filed April 9, 1951, was denied April 10, 1951, Commonwealth, ex rel., Darcy v. Claudy, 367 Pa. 130, 79 A. 2d 785.*

Application for certiorari filed June 12, 1951; denied October 8, 1951, 342 U. S. 837, 72 S. Ct. 61, 92 L. Ed. 632.

In his petition for certiorari filed June 12, 1951, relator's counsel at p. 7 states "All these facts were ascertained as a

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* After we dismissed relator's petition, on appeal the Court of Appeals allowed a stay of execution. See Note 1, supra.

result of investigation by present counsel of the Petitioner and were presented to the Supreme Court of Pennsylvania for the first time in the Petition for Writ of Habeas Corpus which it refused on April 10, 1951."[9] And at p. 3; "* * * former counsel of Petitioner either failed to set forth said additional reasons or were unaware of the said additional reasons which for the most part were the result of investigation by present counsel." And see Id. p. 12," * * * former counsel, employed after the petitioner's conviction and prior to the employment of present counsel, either failed to include * * * or perhaps were unaware of the facts * * *."

Res adjudicata does not apply. Salinger v. Loisel, 265 U. S. 224 at 230, 44 S. Ct. 519, 68 L. Ed. 989, see and cf. Brown v. Allen, supra, 344 U. S. at 458; and Price v. Johnston, 334 U. S. 266 at 291, 66 S. Ct. 1049, 92 L. Ed. 1356, "If for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief." But cf. Id. at p. 289, Wong Doo v. United States, 265 U. S. 239, and see dissent 334 U. S. at 296, 297; Darr v. Burford, supra, 339 U. S. at 203; Brown v. Allen, supra, 344 U. S. at 461, "Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief."

A majority of the Court of Appeals rejected relator's claim of inefficient representation by trial counsel. This being so; if the situation were as obvious as relator now contends it must have been equally obvious to his trial counsel.

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[9] But see petition April 2, 1951

"This is not the case of an accused who has been denied counsel and who has failed to assert his constitutional rights at the proper time because of ignorance, but of one who has had the assistance of able counsel who knew how to raise and would have raised upon the original trial the questions that he is now raising, if there had been any substance to them." Crowe v. United States, 4 Cir. 1949, 175 F. 2d 799 at 801.

"The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States, 28 U. S. C. §2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal: To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime." Mr. Justice Reed, Brown v. Allen, supra, 344 U. S. at 485.

"If defenses may be omitted at trials, rights of review omitted, and yet availed of through habeas corpus, the whole course of criminal justice will be deranged and, it may be, defeated." Ex parte Spencer, 228 U. S. 652 at 661, and see in re Wood, 140 U. S. 278 at 290.

"Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at the state trial and used later to support habeas corpus. State criminal proceedings would be unreasonably hampered." Brown v. Allen, supra, 344 U. S. at 480, footnote 24.

Mr. Justice Reed, "Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection

to conviction on those grounds." Id. at 486, and see Id. 487. "* * * Failure to use a state's available remedy, in the absence of some interference or incapacity * * * bars federal habeas corpus."

As to the "broad reach" given to federal habeas corpus by recent cases, see Mr. Justice Jackson in Brown v. Allen, supra, 344 U. S. at 532, 533. "Once upon a time the writ could not be substituted for appeal or other reviewing process but challenged only legal competence or jurisdiction of the committing court. We have so departed from this principle that the profession now believes that the issues we actually consider on a federal prisoner's habeas corpus are substantially the same as would be considered on appeal." Id. at 540.

"Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. A state properly may deny habeas corpus to raise either state or federal issues that were or could have been considered on appeal. Such restrictions by the state should be respected by federal courts." Id. 541.

As to the scope of review and possible relief on habeas corpus generally, see Commonwealth, ex rel., Elliott v. Baldi, 373 Pa. 489, supra at 492, 495; Commonwealth, ex rel., Carey v. Prison Keeper, 370 Pa. 604; Commonwealth, ex rel., McGlinn v. Smith, 344 Pa. 41, 24 A. 2d 1. See and cf. Woods v. Nierstheimer, 328 U. S. 211, 66 S. Ct. 996, 90 L. Ed. 1177; Dowd v. United States, 340 U. S. 206, 71 S. Ct. 262, 95 L. Ed. 215; Bowen v. Johnston, 306 U. S. 19 at 23, 24, 59 S. Ct. 442, 83 L. Ed. 455; finally, Waley v. Johnston, 316 U. S. 101, 104-105, 62 S. Ct. 964, 86 L. Ed. 1302.

Mr. Justice Frankfurter, Brown v. Allen, supra, 344 U. S. at 503, "Of course, nothing we have said suggests that the

federal habeas corpus jurisdiction can displace a state's procedural rule requiring that certain errors be raised on appeal. Normally rights under the Federal Constitution may be waived at the trial. Adams v. United States, ex rel., McCann, 317 U. S. 269, and may likewise be waived by failure to assert such errors on appeal. Cf. Frank v. Mangum, 237 U. S. 309, 343."

"When a state insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus * * * *However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding* (italics supplied) as in Moore v. Dempsey, 261 U. S. 86; cf. Ex parte Lange, 18 Wall 163; Ex parte Royall, 117 U. S. 241." Id. at 503. Is this such a case?

In view of the mandate we of necessity deferred answering this question until relator was afforded an opportunity to present evidence in support of his allegations. The burden of proving facts inconsistent with judicial records in all proceedings of this kind is heavy. Brown v. Allen, supra, 344 U. S. at 507. Petitioner must "allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that * * * the state so departed from constitutional requirements as to justify * * * intervention to protect the rights of the accused." Darr v. Burford, supra, 339 U. S. at 218; Johnson v. Zerbst, 304 U. S. 458 at 463; Hawk v. Olson, 326 U. S. 271 at 279.

A hearing was held with relator present on March 11, 12, 13, 16, 17, 18, 19 and 20, 1954. Relator called 22 witnesses and offered 137 exhibits; respondent 11 witnesses, 6 ex-

hibits. In addition we have before us the record of proceedings in the state and federal courts.[10]

Although afforded opportunity by the court to testify relator declined to do so. N. T.-H. 614-617. Next day relator's counsel took exception to the questions propounded by the court, alleging relator was compelled to make statements he was not required to make by the United States Constitution. See Id. 723, 725. The exception is without merit. A habeas corpus hearing is not a criminal proceeding. See United States, ex rel., Sholter v. Claudy, 3 Cir. 1953, 203 F. 2d 805, 806; 807.

About 11:25 P. M., December 22, 1947, David Darcy, 22, Harold Foster, 23, Harry Zeitz, 18, and Felix Capone, 16, arrived at the Feasterville Tavern located at the junction of Churchville-Newtown-Bustleton Roads, in the Village of Feasterville, Lower Southampton Township, Bucks County, Pennsylvania.[11] Darcy, Foster and Zeitz, each armed with a revolver,[12] entered the tavern while Capone acted as a "lookout" in an automobile parked nearby with the engine

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[10] May 28, 1954, petition by relator to reopen hearing to clarify some evidence. June 12, respondent moved to dismiss. June 28, after relator's counsel did not appear at the hearing, opportunity was afforded to file affidavits. See 28 U. S. C. A., §2246; United States, ex rel., Darcy v. Handy, supra, 203 F. 2d at 429. After the testimony was filed October 8, 1954, and examined together with the affidavits and the law, the petition to reopen was denied November 10, 1954. See note 30, infra, and see United States v. Willis, 3 Cir. Slip Opinion, Jan. 4, 1955. December 3, 1954, was set as the time for argument, findings of fact and conclusions of law. November 26, 1954, counsel for relator's oral motion for continuance was denied.

[11] They left Philadelphia (Frankford section) about 10:30 in a two-door 1939 Plymouth sedan owned and driven by Zeitz. N. T.-T. pp. 815-816.

[12] 32-20 French mfr.; 32 caliber, Richardson & Harrington; 38 caliber, Smith & Wesson, used on all holdups, stolen by Capone from his home. N. T.-T 824. Id. 746, 847-848.

running for a quick getaway. During the course of the robbery Darcy fired two shots and then engaged in a scuffle with Allen Hellerman and Edward Wunsch. During the scuffle Darcy, Zeitz and Foster fired shots. Hellerman fell to the floor, shot in the base of the neck and paralyzed in both lower extremities.[13] Two shots struck Wunsch causing arm and shoulder injuries. After taking the money from the cash register, Foster demanded that everyone produce their wallets. Darcy said he felt "like shooting someone", and again, "Where is the police? I feel like shooting some of them." N. T.-T. 304. Darcy then threatened several patrons with his gun, lined them up against the wall with their hands up and demanded their watches. While Foster was "covering" those present, Darcy and Zeitz reloaded their guns. After robbing the proprietor and some 18 patrons, with Hellerman lying on the floor "apparently dead" they fired shots into the mouthpiece of the telephone, warned those present not to move for a long time, and departed, Foster returning momentarily as a warning and to wish them all a "Merry Christmas."

Meanwhile, a Mrs. Leutwyler got out a rear door, ran across the road to the Buck Hotel and gave the alarm. At the hotel she found the bartender and two other persons, William Kelly and Frank J. Walter. They followed her outside and stood at the road intersection. While there Horace Patterson, a friend of Kelly, drove out of Churchville Road and stopped to talk with him and Walter. They noticed the automobile, with the engine running, standing in front of the Feasterville Tavern headed toward Newtown. Darcy, Foster and Zeitz ran from the tavern, got into the car, and started off with Zeitz at the wheel. Just then,

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[13] N. T.-T. 726. Critically ill for sometime; appeared as a Commonwealth witness in a wheelchair; since deceased. N. T.-H 895.

one of Zeitz' companions said: "Someone is coming out the door." Zeitz fired two shots, from a gun held in his left hand, from the front window of the driver's side in the direction of Kelly who was then some ten or twenty feet away. One of the bullets struck Kelly in the back of the head causing his death within two days.

A half hour after Zeitz fired the shots, Darcy and his three companions committed another armed robbery of the proprietor and three or four patrons of the Deacon Inn near Penndel, eight miles away from the Feasterville Tavern. Darcy said, "Stop the fooling around. This is a stickup. We just killed a couple of guys." N. T.-T. 685. Capone, with gun in hand, said, "You guys ought to try this sometime, it's fun." N. T.-T. 688. Three shots were fired, two of them into the telephone booth; no one was injured. Upon their return to Philadelphia at 1:17 A. M. December 23, 1947, they were apprehended by Philadelphia police.[14]

That same day all four made a statement to the police voluntarily admitting their participation in the Feasterville Tavern and Deacon Inn robberies (CX-69, N. T.-T. 814), and statements as to having committed seven other robberies since November 30, 1947, using the same automobile and guns and a plan, pattern and scheme similar to that used on December 22, 1947—three in New Jersey, four in the Bucks-Philadelphia Counties area.[15] Altogether seven

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[14] See and cf. Doylestown Daily Intelligencer. Rel. Ex. 12 and 13. Newtown Enterprise, January 1, 1948. Ex. 107, 108.

[15] (a) November 30, 1947, 2:55 A. M., Ralph & Jim's Cafe, Waterford, N. J. Darcy and Zeitz fired two shots into the floor. Capone was unarmed. N. T.-T. 841; see Com. Ex. CX-71. (b) December 3, 1947, 11:15 P. M., Mary's Tavern, Maple Shade, N. J. Darcy, Foster and Capone entered armed; Zeitz acted as "lookout". N. T.-T. 846, Com. Ex. CX-71. (c) December 3, 1947, 1:50 A. M., Old Coin Inn, Hammonton, N. J. Foster, Zeitz and Capone armed; Zeitz fired one shot and pulled telephone receiver from the wall. N. T. Foster-Zeitz

patrons were shot or otherwise injured.[16]

Because of Kelly's death on Wednesday, December 24, all four were held without bail December 26 by Magistrate William Hogan in Philadelphia. Meanwhile their transfer to the Bucks County authorities was delayed by weather conditions. At the hearing Lt. John Hanlon of the Philadelphia police testified as to their admissions.[17]

Monday, January 5, 1948, all four were brought to Bucks County, charged with murder and committed without bail by Justice of the Peace Horace A. Cooper at Langhorne to the Bucks County prison to await action by the Grand Jury February 9, 1948. The Commonwealth was represented by

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trial, p. 1221. Com. Ex. CX-71. (d) December 6, 1947, 1:50 A. M., Bell's Corner Tavern, 8300 Bustleton Avenue, Rhawnhurst, Pa. Foster and Zeitz entered armed; Capone acted as "lookout". During scuffle three patrons, Arthur Coffin, a city fireman, was shot through the chest and abdomen, George Klinger shot through the right leg, and Walter Watten suffered a gashed hand trying to grab one of the guns. Hurrying to make a getaway, the attempted robbery was frustrated. N. T. Foster-Zeitz trial, p. 1239, Com. Ex. CX-74 (e) December 9, 1947, Poplars Inn, Lincoln Highway. Zeitz and Capone remained in car; Foster entered armed; only one person being present in the inn. N. T. Foster-Zeitz trial, p. 1226. Com. Ex. CX-72. (f) December 13, 1947, 1:00 A. M., Wolf's Tap Room, Elkins Park, Pa. Darcy, Foster and Capone armed. Darcy scuffled with a patron, his gun went off; the man was injured. Capone fired three shots into the wall. N. T.-T. 849, Com. Ex. CX-73. (g) December 17, 1947, 1:50 A. M., Pulokas Inn, McDade Blvd., Woodlynn, Pa. Zeitz and Foster entered armed; Capone acted as "lookout". Zeitz fired one shot into the ceiling. N. T. Foster-Zeitz trial, p. 1212, Com. Ex. CX-70. The Commonwealth agreed that Capone's statement in CX-71 about being picked up in New Jersey with a stolen car did not involve Darcy. It was eliminated in the Darcy trial and the jury so instructed. N. T.-T. 857.

[16] Darcy participated in the Feasterville and Deacon Inn and three of the other seven robberies. See Note 15 (a), (b), (f). Only Exs. 69, 73 and part of 71 were received at his trial. Upon objection by defense counsel part of Ex. 71 was excluded with cautionary instructions. N. T.-T. 845-846. See and cf. Rel. Ex. 14, 15.

[17] See and cf. Rel. Ex. Nos. 16 and 17, 18 and 19, 21.

Assistant District Attorney Willard Curtin; Zeitz by I. Louis Rubin, Esq. Coroner's physician Dr. John C. Simpson testified as to the cause of death; Chief County Detective Anthony Russo as to signed statements by the defendants. The possible penalty was not mentioned.[18]

Tuesday, January 27, 1948, a coroner's inquest, upon hearing testimony of Dr. John C. Simpson, coroner's physician, decided that death was caused by a gun shot wound; Pvt. Kenneth R. Dane, Pennsylvania State Police, testified that Zeitz admitted firing two shots in Kelly's direction. The possible penalty was not mentioned.[19]

January 29, 1948, transcript filed, Clerk of the Courts office, Ex. Nos. 1 and 4; Rel. Ex. No. 10, Oyer and Terminer Criminal Docket, p. 320; Ex. No. 115 Criminal Minutes, Docket 1948 to ——, p. 7; Ex. No. 137, Criminal Minutes, Docket 1943 to ——, p. 379.

February 6, 1948, the District Attorney was reported as stating that the murder case was scheduled for action by the Grand Jury February 9, 1948, but the trial would in all probability be continued until the May term.[20]

February 10, 1948, defendants being present (Zeitz represented by I. Louis Rubin, Esq., Darcy by Webster S. Achey, Esq., Capone by Frederick Smith, Esq.) Judge Keller charged the Grand Jury for ten minutes and approved submitting the case to the Grand Jury for action.[21] Six witnesses appeared. 10:55 A. M. all four defendants were jointly indicted to No. 37 February Sessions 1948 for murder. Rel. Ex. No. 2.

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[18] See and cf. Rel. Ex. Nos. 23 and 24.

[19] See and cf. Rel. Ex. Nos. 28 and 29.

[20] See and cf. Rel. Ex. Nos. 34 and 35.

[21] Ex. No. 10, p. 314. See and cf. Rel. Ex. Nos. 36 and 37.

The District Attorney then moved for a continuance until the May Term because of the critical condition of Allen Hellerman (a Commonwealth witness) and because Harold Foster was without counsel. The continuance was granted. Rel. Ex. Nos. 116, 1[illegible], p. 379.

March 1, 1948, Webster S. Achey, Esq., on Darcy's behalf and Frederick Smith, Esq., for Capone, moved for a severance and separate trials.[22] It was reported [23] that the court commented "Separate trials * * * will mean that it may take a year to dispose of the cases", and suggested to counsel the advisability of a combination trial as to all defendants, but counsel insisted on their legal rights. Judge Keller granted the motions. Rel. Ex. Nos. 1, 4, 10, p. 320.

March 3, 1948, Judge Boyer appointed Donald B. Smith, Esq. and William Freed, Esq., as counsel for Harold Foster.[24] Rel. Ex. No. 10, p. 321. Id. Ex. Nos. 1 and 4. Id. Ex. No. 45.

There were only two attorneys in the District Attorney's office in Bucks County at that time, Edward G. Biester, and his assistant, Willard S. Curtin. While both were engaged in murder cases other cases could not be disposed of without difficulty. The murder cases had already been continued from the February term. Allen Hellerman, a witness, was in serious physical condition. The District Attorney decided in the interests of Justice [25] that the cases

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[22] Act March 31, 1860, P. L. 427 §[illegible] (Pa.) 19 P. S. §785.

[23] Rel. Ex. Nos. 43 and 44.

[24] Act March 22, 1907, P. L. 31 §1, as amended April 6, 1949, P. L. 406, §1, Pa. 19 P. S. §784. See Commonwealth v. Thompson, supra, 367 Pa. 102. Rel. Ex. No. 45.

[25] See Act March 31, P. L. 427, §54 (Pa.) 19 P. S. §781, "Two Term Rule". "* * * Unless the delay happen on the application or with the assent of the defendant* * *." Pa. Constitution, Art. 1, §9, "* * * a speedy public trial by an impartial jury of the vicinage * * *" Cf. p. 11, supra.

should be tried as promptly as possible.

At a conference in early March 1948 defense counsel were advised that the Foster-Zeitz case would be called first for trial, the Darcy case the following week; then Capone. May 17, 1948, the Capone case was continued; [26] the trial list prepared for the May term and counsel for Darcy again notified that the Darcy case would be called for trial the week following the Foster-Zeitz trial which was first on the list; the precise date of commencing the Darcy trial depending upon the date of completion of the Foster-Zeitz trial.[27] Subpoenas for the Darcy trial were sent out the end of the week of May 24 or early in the week of June 1.

April 12, 1948, a venire was ordered, Rel. Ex. No. 8, for the empaneling and summoning of 120 jurors for service "At the term * * * commencing on the 17 day of May * * * 1948 * * * to serve for the week term (sic) thereof commencing on the 24 day of May * * * 1948". Simultaneously Rel. Ex. No. 9 called for 120 "* * * to serve for the week term (sic) * * * commencing on the 1 day of June 1948". On the

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[26] Rel. Ex. No. 10, p. 337, continued February 12, May 17. Arraigned and plead guilty September 29, Frederick Smith, Esq., Edward Kelly, Esq., Philadelphia, for defendant. Received testimony of Foster-Zeitz trial, Commonwealth's witnesses, defendant's witnesses. Case continued (see Rel. Ex. Nos. 10, 115, p. 59). Argument court, February 9, 1949, case continued on account of illness of Edward H. Kelly, Esq.; April 11, 1949, case continued from June 8, 1949, to June 17, 1949. Ex. No. 10, p. 449, Hon. Fred W. Davis, 43rd Judicial District, specially assigned. June 17, 1949, Commonwealth's witnesses, defendant's witnesses, and argument. September 6, 1949, defendant guilty of murder first degree, imprisonment for life. September 7, 1949, sentence.

[27] See and cf. Rel. Ex. Nos. 51, 52, May 14, 1948, "* * * only two will be tried during the approaching term * * * Darcy and * * *. Capone will be tried later." Ex. Nos. 55 and 56, May 24, 1948, "Only two of the defendants charged with the murder will go on trial this term * * * The other two defendants * * * will be tried at a later term of court." But see Rel. Ex. No. 64, May 28, "at a later date"; No. 65, May 29, "tried later"; Capone, Rel. Ex. Nos. 70, 91, 99, "not until September".

return of the writ the sheriff certified, Rel. Ex. Nos. 6 and 7, that the persons named were summoned to appear in court at 9:45 A. M. on May 24 and June 1, respectively.[28] Ordinarily the jurors, unless previously excused by Judge Keller, would report on the date directed. However, when it became apparent that the Foster-Zeitz trial would continue into the week of June 1, the court directed the sheriff's office to notify verbally all who had been summoned for jury duty as of Tuesday, June 1, 1948, not to appear until Monday, June 7, 1948. They were so notified and did not appear for duty until June 7 as directed.[29, 30]

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[28] See Rel. Ex. No. 137, p. 391-392, Foster-Zeitz panel, and see Rel. Ex. Nos. 53, 54 and 123a (Quakertown Free Press, May 27), Darcy (Id 393) panel, Rel. Ex. No. 55 and see No. 123B.

[29] Members of the May 24 panel served during the week of June 1 (Rel. Ex. No. 10, p. 334, Ex. No. 137, p. 401)—June 2, 3, 4. No names in the Foster-Zeitz panel were included in the Darcy panel. Juror Wm. H. Slaughter, N. T.-T 218, a former night watchman at the Bucks County Home, acquainted with all the attorneys in the Darcy case, attended sessions "off and on" on several days of the Foster-Zeitz trial. There is no evidence that he was in court on June 1. He was excused from the Darcy case for cause. See colloquy N. T. p. 220 as to whether or not such presence per se was a disabling cause.

See and cf. Rel. Ex. No. 10, p. 331, "Eo Die—1948, June 1—Court called at Ten O'clock A. M. Hon. Hiram H. Keller, P. S. and Hon. Calvin S. Boyer, J. presiding.

Eo Die—List of Traverse Jurors Summoned and Returned by the Sheriff to the May Term of Criminal Court A. D. 1948 (second week) * * *"

Id. at 332, "Eo Die—The Second Week Traverse Jurors Having Been Called, All Answered to Their Names But the Following * * *" See Rel. Ex. No. 137, p. 393, Ex. No. 9 is spelled out, then "1948 June 1—List of Traverse Jurors Summoned by the Sheriff and Returned to May Term of Criminal Court A. D. 1948." Id. at 394. "List of Traverse Jurors That Were Excused From the May Term of Criminal Court A. D. 1948".

[30] Upon appearing in court the names on the Traverse Jury List were called and the jurors presence noted thereon (Foster-Zeitz Resp. Ex. No. 1, Darcy Resp. Ex. No. 2). They did not receive attendance cards. At the end of the jurors service the Traverse Jurors List was

In each trial jurors waiting in the Grand Jury room were called individually into the main court room, carefully and searchingly examined on voir dire. In each trial a fair and impartial jury of twelve and two alternates was obtained.[31] It took more time to select a jury in the Foster-Zeitz case; each defendant had twenty peremptory challenges;[32] each a separate independent examination; two extra venires were called.[33, 34] Foster and Zeitz each exercised sixteen

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certified, together with an individual voucher for each juror (Foster-Zeitz Resp. Ex. No. 3(a), et seq., Darcy Resp. Ex. No. 4 (a), et seq.) by the Clerk of Courts to the Controller. The latter paid each juror upon each juror signing an individual receipt therefor (Foster-Zeitz Resp. Ex. No. 1, Darcy Resp. Ex. No. 1). The Traverse Jury List and the individual jurors vouchers show only the number of days not the dates served. In view of the foregoing there was no necessity for reopening the hearing to obtain additional evidence as requested by relator.

[31] (1) In the Darcy case: Wm. P. Pardoe, Yardley, Trenton, N. J., foreman; (2) Mrs. Anna Bucher, Newtown, housewife; (3) Marvin D. Weidner, Telford, clerk; (4) Jesse H. Horne, Quakertown, farmer; (5) Oliver C. Landis, Perkasie, farmer; (6) Franklin T. Fretz, Perkasie, salesman; (7) Roger Mason, Perkasie, farmer; (8) Howard Price, Doylestown, farmer; (9) L. Calvin Fluck, Quakertown, hosiery knitter; (10) Mrs. Elva A. Shive, Dublin, housewife; (11) Mrs. Ruth G. Bliss, Doylestown, housewife; (12) Mrs. Ann L. Reed, Penns Park, housewife. Alternates: (1) Wm. F. Hickey, Morrisville, Tel. Constn. Supt.; (2) Mrs. Virginia Brillman, Point Pleasant, housewife.

[32] Two extra in selecting alternates. N. T. Foster-Zeitz 527. Before being sworn juror No. 12 was excused for illness; replaced by another. N. T. Foster-Zeitz, 389.

[33] Foster-Zeitz: 11:00 A. M. May 24, to 2:55 P. M. May 27, N. T. 4 to 544, 120 summoned; 86 responded (2 non est; 2 deceased, 30 excused by Judge Keller—illness, physical defects, home conditions, etc.) After 66 were examined, 8 selected, May 25, 3:10 P. M., venire 50. N. T. 258. After 121 were examined, 11 selected, May 26, 4:00 P. M. venire 25. N. T. 455, Rel. Ex. No. 1, 10, p. 341, 344. Seven of the 25 were examined. 175 summoned; 143 examined. Neither Darcy or Capone names were mentioned.

[34] Darcy: 10:15 A. M. June 7, to 1:55 P. M. June 8, N. T. 2 to 270. 120 summoned; 81 responded (6 non est; 2 deceased; 31 excused, Id. Note 33, supra. Defense counsel objected to the number excused;

peremptory challenges; the Commonwealth thirteen; challenged for cause or excused were thirty-seven with conscientious scruples, seventeen for illness, physical defects, home conditions, etc., thirteen clients of counsel engaged in the trial, seventeen for fixed opinions or bias.[35]

Darcy exercised only ten peremptory challenges; the Commonwealth eight. Challenged for cause or excused were twenty-five with conscientious scruples; nine for illness, physical defects, home conditions, etc.; one client;

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but see Com. v. Pasco, 1938, 332 Pa. 439 at 444, 2 A. 2d 736. When the Commonwealth requested alternates, Mr. Achey, at sidebar, stated he intended to move for a change of venue if an extra venire was required, the Darcy case being the second case under a single indictment, but see Com. v. Riggs, 1934, 313 Pa. 457, 169 A. 896. The occasion did not arise.

[35] Four knew Kelly: No. 9 worked with him, followed the case; No. 41 read the Newtown, Doylestown and Philadelphia papers, and talked about it at work; No. 60 read the papers; No. 74 knew Kelly and some of the witnesses, read local and Philadelphia papers; 6 knew counsel; No. 64 Atty. Freed; No. 84 Atty. Smith, read about and discussed the occurrence; No. 126 Atty. Smith, his wife's counsel, read about it at the time and recently; No. 134 former client of Atty. Rubin, and read the papers; No. 109, District Attorney Biester, read about the occurrence; No. 125, the District Attorney and his assistant, Mr. Curtin, read about and discussed the case. Three read the Philadelphia Evening Bulletin, No. 78, No. 119, No. 128; the latter the Quakertown Free Press. One read the Philadelphia and the local papers, No. 110. Two read "the papers", (No. 82) and discussed it (No. 141). One read the Doylestown Daily Intelligencer at the time (No. 69). But quaere No. 69, No. 82, No. 119, No. 134.

fourteen for fixed opinions or bias.[36, 37, 38]

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[36] No. 43 knew Kelly's brother, visited the Feasterville Tavern, read the papers, but said his opinion might be changed; No. 69 lived near the Feasterville Tavern, knew the owner, proprietor, and some of the witnesses in the case; No. 35 knew the Beacon Inn proprietor, had about and discussed the case; No. 29, juror Westlake (see Note 37 infra) read or heard about the case; No. 62, juror Slaughter read about the case, attended some session of the Foster-Zeitz trial "off and on"; no opinion; No. 5's wife worked in Mr. Biester's law office, read the papers and discussed the case; No. 65 read about the case; No. 67 read some, "mind set"; No. 75 read papers and discussed case; No. 19 read about the trial in the Doylestown Daily Intelligencer; no opinion in the Darcy case, scruples; No. 25 read "more or less"; "I think I have an opinion", "some scruples"; No. 39 faulty hearing, read about case; No. 45 discussed case; No. 54 read about and discussed case; drove truck for Philadelphia Inquirer; No. 5, No. 19, No. 45 were challenged by the Commonwealth; No. 39, No. 62 were excused by agreement. Quaere as to No. 19, No. 25, No. 39, No. 54, No. 62.

[37] After three jurors were selected, not sworn, Mr. Achey questioned juror Westlake as follows: Q. "Have you formed any opinion as to the guilt or innocence of this defendant, David Darcy?" A. "Well, I think—yes, I have. It is one of the most cold-blooded murders I have heard of." Mr. Achey: "If your honor please, I ask--" The Court: "That will be stricken out." Mr. Achey: "I object to that answer. It was uncalled for." The Court: "Objection sustained. Do not venture any opinion. Just answer the questions in the way they are asked of you." Mr. Achey: "I would also ask for a mistrial by reason of that statement." Court: "Motion denied." Mr. Achey: "Exception." Court: "Yes, the jurors already selected will totally disregard that remark or answer made by that juror." Mr. Achey: "May I ask that this juror be dismissed." Court: "He will be discharged for cause." N. T.-T 97, see Rel. Ex. No. 82, and see Com. v. Dreamer, 1936, 324 Pa. 220 at 222-223, 188 A. 11. Next morning at sidebar, the District Attorney moved that the 8 then selected be excused to avoid any other such incident. Upon Mr. Achey's objection the motion was not pressed. N. T. 189-190, and see voir dire, juror No. 34, Mrs. Rosenberger, and juror No. 37, Harold Lake.

[38] See and cf. Rel. Ex. No. 59, May 26, "conscripted"; Rel. Ex. No. 61, Id. May 27, "* * * searching for jurors * * * willing to serve if accepted." Rel. Ex. No. 74, Id. June 3, "The Gossiper", "* * * flurry of dodging"; citing reasons. Id. loss of wages, business engagements, dislike serving on murder jury. Id. "never sat that long".

Rel. Ex. Nos. 80, 81, June 7, "* * * long ordeal * * * drawing * * * jury * * * great difficulty * * *" Rel. Ex. No. 82, June 8, "Less trouble than * * * Zeitz and Foster * * *" Rel. Ex. No. 111, June 10, "While many * * * thought * * * jury * * * difficult to secure * * * took less time than * * * last week."

Once accepted the jurors were kept together, during the trial, under the watchful care and supervision of court officials (in Foster-Zeitz 3, in Darcy 4 uniformed tipstaves). The jurors were not permitted to see any newspapers, hear any radio, or see any television program. They were kept free from any outside influence or contact.

At no time during the trial was there any need to call for order.[39] There were no outbursts, no disturbances, no

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[39] But see Rel. Ex. No. 76, June 4, "The grief stricken mother of * * * Zeitz, collapsed in court Thursday afternoon just before her son's attorney * * * started his address to the jury. She was rushed to the * * * hospital after (a) doctor * * * was called to the court room.

A few minutes later, Mrs. Ethel Foster * * * also received medical attention from court attendants. When she became ill * * * Zeitz jumped to his feet and tried to get to his mother's side, but was held back by State Troopers.

Judge Boyer directed that the defendants be removed from the court room until the dramatics were over." Incidents not reported in N. T. 1298, 1299. Rel. Ex. No. 88, June 10. Darcy's mother collapsed in the corridor; court officers summoned a physician. Id. Judge Keller commented on the actions of a number of young girls defacing the newly painted walls of the ladies' room while attending court. Rel. Ex. No. 136, "Front Page Detective", Vol. 12, No. 2, June 1948, Copyright 1948 (Dell Pub. Co., Inc.) 73 pages, 15c—contained as the 12th of 14 stories, "Kill Crazy! * * * Could they be stopped short of murder?" by John Keith. Across pages 34 and 35 a picture posed by models carried a legend substantially factual as to Hellerman's plight December 22; pp. 34, 36, 37 interspersed with pictures (p. 36 Feasterville Inn, police, p. 37 police with three of the defendants—not Capone—at their preliminary hearing) first tells of the Bell's Corner Tavern incident, of the efforts of the police to capture defendants before anyone was killed; parts of pp. 70, 71 and 72 relate incidents on December 22; finally, "The case against them is being prepared, and the men will be brought to trial following indictment by the Bucks County Grand Jury.". The defendant's brother and sister each testified that on occasion there were some copies of the magazine in the court room, once while the trial was in progress, 3 copies; another during the noon recess, 15 copies. If there were any such magazines in the court room they were concealed from the eyes of the court room attendants and did not under any circumstances come to the attention of the District Attorney, his assistant, the court, or the jury. See N. T. 539-546, 550-557, 571-573, 582, 586. And see Resp. Ex. No 5, par. 17, 18, no extra police precautions.

untoward incidents either in or outside the court room, in Doylestown, or elsewhere throughout the county.[40] None-

[40] Relator called seven witnesses who heard remarks between December 22 and June 15, to prove the feeling of people in general toward the defendants, contending that this evidence and other circumstances amounted to a state of hysteria and prejudice and that the feeling grew in intensity, reaching its climax at the Darcy trial. The evidence supports no such contention. (a) Rev. A. Damrosch, St. Paul's Episcopal Church, Doylestown, acquainted with Harold Zeitz; remarks principally by members of his parish. (b) Rev. Wm. Babinsky, Reformed Church of America, Feasterville ("roughly fifteen miles from Doylestown"; pop. about 1500; church membership "roughly 150"; regular attendance "difficult * * * to remember * * * perhaps 100"; knew Kelly and officiated at his burial service), as to conversation in the Feasterville area. (c) Cole Farrier—attorney for Harold Zeitz (not of record during the trial—Attorney Rubin engaged for that purpose) prepared and argued appeal before the Supreme Court of Pennsylvania and application before the Pennsylvania Board of Pardons; counsel for some patrons robbed in the Feasterville Inn; member of the Society of Friends and opposed to capital punishment—as to the Feasterville area and commuters on the morning Philadelphia train. (d) Dr. Carl J. Hoffman—examined Darcy in 1950 and wrote a letter on his behalf to the Governor of Pennsylvania—as to remarks in Feasterville, Newtown and Richboro. (e) Howard R. Price, a friend of Darcy's sister, who resided in Andalusia in the S. E. tip of Bucks County but as a salesman of automobile parts made monthly calls in Bristol, Doylestown and Sellersville. (f) Leicester Knickerbacker Davis*— a photographer who came to Doylestown December 13, 1947, after an absence of 22 years—approached and questioned perhaps 100 to 150 people in the Doylestown area to ascertain their reaction to the crime to provide background material to write an "early American naval novel * * * probably evolving into a book on the responsibility of society as regards youthful crime," (N. T.-H. 417). (g) Mrs. A. Patterson, Zeitz' aunt and (h) Mrs. Inez Darcy Heckman, Darcy's sister, as to remarks in Doylestown. Generally the witnesses could not recall any particular person or the time or place of any particular remark, or exactly what they heard in context.

The several witnesses testified: (a) The feeling then and now was one of "* * * indignation * * * antagonism towards the defendants and a general feeling that they all were guilty". (b) talked with 100 people during that time; "the prevailing sentiment of the community * * * bias in favor of condemning the defendants * * * some said they don't need a trial * * * they should be condemned to death * * * shouldn't have any mercy * * *" "There were no expressions of threats of violence in the sense that anybody was going to organize against the defendants * * * people said they ought to be hanged * * * shot

* * * get the chair * * * one said they ought to be stamped out like bugs." There were at no time any disturbances or other unusual incidents. (c) talked to about 50 people; saw about two copies of the local newspapers; heard some radio comments; one of the patrons of the Feasterville Inn thought Zeitz ought to burn because he fired the shot. Some people were displeased because he was representing Zeitz and let him know it; others asked when the defendants were going to burn; some facetious—some serious; notwithstanding this, the witness raised no such question on the Zeitz appeal. (d) "They ought to be hanged * * * get the chair * * * why bother with them * * *" The idea of "* * * gangsters * * * coming into Bucks County doing these crimes * * * should have stayed in Philadelphia * * * should be no mercy * * * we should throw them out." (e) "* * * they had no place there * * * they should be given Bucks County justice." Once in the spring in a store in Sellersville and again at a gas station in Andalusia he heard "* * * if they had anything to do with it they would see that the boys were lynched * * *" At other times he heard the word "hang", "shot". We rejected Ex. No. 117 offered to refute any idea of fabrication of the witness' testimony because the words used in court were not contained therein—the letter contained a series of conclusions; Mrs. Price was not in court and we had grave doubts that the witness was the author of that letter. (f) "People were shocked", "We * * * are not a lynching community * * * a large percentage (50—60—70) of the people I talked with were outraged and they thought there should be very drastic punishment meted out * * *" "Criminals cannot come into Bucks County and commit crimes * * *" Some "* * * hope they would get the hot seat * * * some wild talk * * * like to see them taken out and shot * * * strung up * * *" (g) Heard a maid say, "* * * just like a carnival", "they haven't got a chance * * * because they hate Philadelphia boys and they are very, very bitter * * * they're going to burn for it." A man said "all cut and dried * * * before it starts." Outside the court house some men said they were going to see the execution. Quaere, an emotional witness whose testimony we did not believe either in this or other particulars (e. g., as to an alleged remark by the District Attorney, one by Judge Boyer and another by school children). (h) In January and in the spring heard some man say at lunch in the Doylestown Inn "they shouldn't go to all that bother * * * they don't deserve a trial * * * they should be strung up." In one of the court house offices during lunch time, during the Darcy trial, heard someone say, "* * * He doesn't stand a chance either"; "* * * He's going to get it too."

N. B. (a) Attended one session of the Foster-Zeitz, not the Darcy trial; (b) One day at the Foster-Zeitz, not the Darcy trial; (g) Second week of the Foster-Zeitz, not the Darcy trial; (h) Darcy trial, not Foster-Zeitz; (f) Not remember the Darcy trial as well as the Foster-Zeitz; (c)(d)(e) Not at either trial.

from December 22, 1947, down to or after the trial. At no time during either trial was the court room filled to capacity.[41] The attendance at the Foster-Zeitz was larger than at the Darcy trial.[42] The proceedings were reported in the

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* Philadelphia Public Ledger, discontinued about 1935, connected with Society Prevention of Cruelty to Animals; July 1944, security clearance by Fourth Naval District to visit naval establishments, Rel. Ex. 131; March 1945, Lieutenant temporary Coast Guard, public relations liaison officer, 4th Naval Dist. to serve without pay, Rel. Ex. 130; claimed to be a "war correspondent" but quaere, he was never outside continental United States. Apparently on occasion visited United States Army camps, see Rel. Ex. 127; Collier's April 1945, a two page picture story about the training of G. I. War Dogs, Rel. Ex. 128; Collier's, September 1941, witness given credit for four pictures interspersed in a two-page story written in a light humorous vein by one G. W. about army camps, Rel. Ex. 125; November 1940, two page picture story, "People and Places" on police cars in Philadelphia, no by-line, Rel. Ex. 129; Commonwealth Magazine, four page picture story of Bucks County; civil defense work, Bucks County and Borough of New Hope during a four month period, Rel. Ex. 132, 133, 134.

[41] See certificate Keller, P. J., "16. The trial was held in the main court room with seating capacity of approximately five hundred persons. The attendance at the Darcy trial was surprisingly small, in number, and at no time throughout the trial was the court room more than partially filled." The attendance was never more than 300; rarely over 200; during the voir dire examination only 50 to 60 persons.

[42] Foster-Zeitz: Rel. Ex. No. 58, May 25, Judge explained voir dire procedure to 200 high school students attending trial; Rel. Ex. No. 70, June 2, night session attended by several hundred spectators; Rel. Ex. No. 74, June 4, "So great is the interest * * * that an extremely large number of spectators crowded into the court room yesterday". Rel. Ex. No. 78, June 5, "more than three-quarters filled" when verdict rendered.

Darcy: Rel. Ex. No. 88, June 10, evidence "much the same"; Rel. Ex. No. 111, June 10, Newtown Enterprise, Id.; Rel. Ex. No. 91, June 11, Id.; Rel. Ex. No. 95, June 12, by agreement of counsel, only the statements implicating Darcy were introduced; Rel. Ex. No. 88, June 10, girls present; Rel. Ex. No. 92, June 11, "* * * at least 200 spectators" this morning "many of them young folks". Rel. Ex. No. 97, June 12, considerably more young girls than boys—some youngsters not five years old.

daily press [40] and, on occasion, on the radio.[41] The reporting

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[40] Foster-Zeitz trial: **Doylestown Daily Intelligencer,** daily ex. Sun. for 125 years [Doylestown Borough, County seat, laid out 1778, pop. 1950—5262, 1940—4976 (Twp. 2364—1471)] Cir. Oct. 7, 1947—5297; Oct. 6, 1948—5329; N. T.-H. 226-227, 231, primarily in center of county—Doylestown, Newtown and parts of Montgomery Valley, N. T. 194, Rel. Ex. No. 55, May 24 to No. 78 June 5. **Bristol Daily Courier,** daily ex. Sun. [Bristol Borough, pop. 12,710—11,895 (Twp. 12,134—5,857)] common ownership with Doylestown Daily Intelligencer; file copies being microfilmed, not produced; same coverage with more moderate makeup, space allocation, headlines and editorial policy. N. T.-H. 368-369, 370-373. Cir. Sept. 30, 1948—5397, N. T.-H. 370-372, eastern and lower Bucks County—Morrisville, Penndel, Bristol Twp., Benalsem Twp., mostly in Bristol Borough and surroundings. N. T.-H. 372. **Newtown Enterprise,** weekly Thur. [Newtown Borough, pop. 2095—2009 (Twp. 1013—816)] Cir. Oct. 7, 1948—1972, within five mile radius, N. T.-H. 255/259, Rel. Ex. Nos. 109, 110, June 3; Rel. Ex. No. 111, June 10. **Quakertown Free Press,** weekly Thur. [Quakertown Borough, pop. 5673—5150)] Cir. not quite 5000, northern part of county, radius 25 miles, Rel. Ex. No. 123B, May 27, 123E, June 9.

Darcy trial: (a) Doylestown Daily Intelligencer, Rel. Ex. No. 80, June 7 to Rel. Ex. No. 102, June 15, Rel. Ex. Nos. 103, 104, 105, June 17, Rel. Ex. No. 106, June 19; Quakertown Free Press, Rel. Ex. Nos. 123F and 123G, June 17; and see Newtown Enterprise, Rel. Ex. No. 111, June 10.

Pre-trial, Foster-Zeitz and Darcy: Doylestown Daily Intelligencer, December, 6 issues, Rel. Ex. Nos. 12 to 22 incl.; January, 4 issues, Rel. Ex. Nos. 23 to 29 incl.; February, 6 issues, Rel. Ex. Nos. 30 to 41, incl.; March 1 and 3 (2 issues) Rel. Ex. Nos. 43 to 45 incl.; April 2, 3, 17 (3 issues), Rel. Ex. Nos. 46 to 48 incl.; May 7, 12, 14, 19 (4 issues) Rel. Ex. Nos. 49 to 54 incl.; Newtown Enterprise, Rel. Ex. Nos. 107, 108, Jan. 1, 1948.

Foster-Zeitz trial: Doylestown Daily Intelligencer, May 24, 25, 26, 27, 28, 29 (6 issues) Rel. Ex. Nos. 55 to 66 incl.; June 1, 2, 3, 4, 5 (5 issues) Rel. Ex. Nos. 67 to 79 incl.

Darcy trial: Id. June 7, 8, 9, 10, 11, 12, 14 (7 issues) Rel. Ex. Nos. 80 to 100 incl.; June 15, 17, 19 (3 issues) Rel. Ex. Nos. 101 to 106 incl.

The Doylestown Daily Intelligencer is published at 1:30 P. M. daily. N. T. 229. By noon June 8, 12 jurors had been selected; 2 alternates by 2:00 P. M.

(Population figures—Penna. Manual, Vol. 91, 1953-1954.)

[41] **Radio Station WBUS,** Doylestown; **WBUX, Quakertown;** each on the air for the first time May 20, 1948. Extent of coverage WBUS doubtful, N. T.-H. 272-273. Only evidence of WBUX coverage, see Quakertown Free Press, May 20, No. 123A, May 27, No. 123B, June 10, No. 123E. **WFIL Radio and Television, Philadelphia,** only evidence

was factual, with an occasional descriptive word or phrase, and, on occasion, words of compassion or commendation.[45]

We found only one instance of editorializing in the news columns. The editorials were stimulating, thought-provok-

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of coverage December 23, 1947, 15 to 22 seconds; January 21, 1948, 1½ to 2 minutes; radius of 50 miles; number of TV sets at that time limited. N. T.-H. 267-272. See films, Rel. Ex. Nos. 112-113, and see Rel. Ex. No. 114, Philadelphia Inquirer, Jan. 21, 1948, Philadelphia Inquirer award to Arthur Coffin for frustrating attempted robbery at Bell's Corner Tavern, and to the two police officers for apprehending defendants.

Of 224 jurors examined on voir dire only one of the Foster-Zeitz, No. 142, only two of the Darcy panel, No. 7 and No. 41, heard pertinent radio comments.

[45] Rel. Ex. No. 65, "horror", "alleged trigger man"; Rel. Ex. No. 65, "trigger happy bandit", "wise-cracking", "hard boiled behavior"; Rel. Ex. No. 72, "sensational 30 day crime spree"; Rel. Ex. No. 109, "the sordid tale of thrill seeking youths * * *" which "* * * ended in murder", "wantonly".

Words of commendation: Rel. Ex. No. 36, February 10, "* * * impressed court officers and spectators as high school juniors * * *" Rel. Ex. No. 55, "Zeitz * * * wearing his military discharge button * * *" Rel. Ex. No. 72, June 3, Foster entitled to wear 14 naval battle stars; Zeitz served in the Army. Rel. Ex. No. 86, June 9, Darcy's father recently promoted to be assistant crier in Philadelphia courts.

Compassion: Rel. Ex. No. 23, January 5, "Zeitz * * * confessed to firing the shot that killed Kelly (although not intentionally) * * *" Rel. Ex. No. 57, May 25, many opposed to death penalty; Rel. Ex. No. 62, May 27, "two war veterans * * *"; other jurors with conscientious scruples. Rel. Ex. No. 71, June 2, and see Rel. Ex. No. 86, June 9, Capone cannot read or write, cf. Rel. Ex. No. 39, February 11. Rel. Ex. No. 75, June 4, Zeitz' parents and Foster's mother were not in court during charge. Rel. Ex. Nos. 78, 79, June 5, two young killers spend most of their time reading the Bible, cf. Rel. Ex. No. 87, June 9. But see Rel. Ex. No. 123E, "Zeitz * * * glanced almost defiantly at Judge * * * Boyer as he congratulated the jury * * *" State police thought Zeitz and Foster expected the worst from the start. Rel. Ex. Nos. 101, 102, June 15, "Darcy took it like a stoic * * * according to police * * * sensed the verdict several days ago"; Rel. Ex. No. 102, "I expected it". And see Rel. Ex. Nos. 123F and 123G, June 17.

ing, instructive and fair comment.[46] The newspaper policy

[46] To correctly appraise the editorial comments they must be viewed in their proper context. In the fall of 1947 two Philadelphia juries, predominantly women, found a 23 year old defendant, named Hallowell, guilty of murder in the first degree for the killing of two policemen in a gun battle but fixed the penalty at life imprisonment. Rel. Ex. 84, June 8, 1948. There were protests of "maudlin sympathy". A proposal by Judge Harry S. McDevitt that the duty to fix the penalty in first degree murder cases should be taken from the jury, contending that they "do not know how to exercise it", was referred to a legislative committee.

December 26, Rel. Ex. Nos. 16 and 17, reported "Bucks County now has a four-way murder case on its hands * * *" In an otherwise factual report written by an able conscientious reporter of 35 years experience, who covered the occurrence and the trials, an editorial comment read "Feeling Runs High, The general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the youthful bandits to trial, that it is a 'break' for society at large to have the trials in Bucks County rather than in Philadelphia."

December 27, Rel. Ex. 20, in "Fast Police Work", the editor after thanking the Bucks County and Philadelphia police for their speedy apprehension of the defendants declared, "What the public and police will be watching closely is what is done to these potential killers when they come before the bar of justice." Recalling one of Darcy's remarks during the Deacon Inn robbery, the editor wondered why policemen take so many chances with dangerous criminals, especially in view of the recent Philadelphia verdict. December 31, Rel. Ex. No. 22, "Errors of Jurors", discussed acquittals when there was ample evidence, the feasibility of having professional jurors; that judges sometimes do not rise to their responsibilities; such problems arise in cases of murder, drunken drivers, and in coroner's juries in highway death cases. The editor declared "* * * responsibility for miscarriage of justice does not rest alone with jurors * * * but in the courts and in the public's mind as it is expressed in antagonism to punishment for certain types of offenders." February 2, Rel. Ex. No. 31, "Who'll Be the Next?" discussed the problem of assaults by holdup men on the aged, on streets and in shops. Authorities and the public should insist that they receive impressive punishment to deter others from following their example. The editor declared, "If juries and courts will make examples of these cowardly enemies of society, there will be fewer of these assaults. It would be lamentable if citizens were forced to take the punishment * * * into their own hands." An INS news story February 6, Rel. Ex. No. 34, reported that the legislative committee chose to preserve the power of jurors, believing that a legislative proposal for separate findings by juries would result in more

satisfactory verdicts. Id. No. 34 described the February Term of Court as one of the most important criminal sessions in a long time.

A Calstadt, N. J., truck driver was fined $25 for attacking a married woman; some citizens, displeased with such a disposition, tarred and feathered the defendant. February 11, Rel. Ex. No. 38, under the title "Enraged Citizens", the editor declared that "Mob law is not the kind we want in this country * * * but * * * probably * * * thousands of women * * * felt like cheering when they read * * *" of the public reaction in New Jersey. "Presumably they felt that $25 * * * inadequate to intimidate others * * * and remembered that courts have even let rapists escape with ridiculously light punishment * * * not * * * so gentle * * * if own families * * * the victim * * * In Delaware * * * if * * * convicted * * * face the death sentence." February 16, Rel. Ex. 40, 41, reported the arrest by Doylestown police of six young Philadelphians said to have committed six Philadelphia robberies, a $3000 robbery in Bucks County, stolen motor vehicles, violated the fire arms act, and attempted to rob a large Bucks County estate. When arrested they were carrying stolen revolvers and 114 rounds of ammunition. Some of them were acquaintances of Foster, Zeitz, Darcy and Capone. On the front page a box read, "Ten Young Problems"—"Something to worry about in the way of juvenile delinquency has been furnished by ten Philadelphia boys now incarcerated in the Bucks County prison. Four of the boys are charged with murder. Six of the boys are being charged today with robbery, fire arms violations, stick-ups and burglary. Ages of the boys make police and others wonder what's going to happen next? Two * * * are juveniles, age 16 * * * another * * * 17 * * * two * * * are 18; one is 20; one * * * 21; two are 22; * * * one 23. One of the sixteen year old boys carried a loaded revolver in his stocking, and one 18 year old boy was the one accused of pulling the trigger in the murder case."

February 18, Rel. Ex. No. 42, in "Time for An Example", the editor commented: "The Overflow of Philadelphia's young criminals into Bucks County, might, it seems reasonable to believe, be discouraged if the crooks were given sentences which would be impressive and get headlines large enough to be seen and become impressive. Stiff sentences have had that effect before. Once before it brought an epidemic of arson to an end for several years. Another time it taught tramps, who had been filling the county jail and bedeviling the people of lower Bucks, to keep away from the county. Recent arrests of two gangs of young criminals, one of them held for murder, should help to discourage these criminal forays into the county * * * **especially if they are convicted and sent away for impressive periods.** Trying to find excuses for enemies of society invites more crimes." (Emphasis supplied.)

A 17 year old student arrested by the Philadelphia police Rel. Ex. No. 46 was reported to have admitted setting fire to nine buildings, some of them schools; he said he did it "just for fun". The editor

commented, "Unless the courts recognize the awful possibilities of such an attitude * * * and take away their opportunities for destroying property and lives, the public will continue to be menaced. Institutional restraint for persons with such impulses is the only protection for society and **the protection of the public should be the first consideration.**" (Emphasis supplied.)

In Philadelphia an intoxicated driver in a stolen car, while racing another automobile, lost control, crashed over a sidewalk into a group of women and killed a woman pedestrian. After finding him guilty of murder in the second degree the judge sentenced him to 2½ to 5 years. The Philadelphia Inquirer declared in an editorial, "Mild Sentence for Murder", reported in Rel. Ex. No. 46 on April 2. "Mild Sentence for Murder" said inter alia, "As a deterrent to criminally reckless automobile drivers, the sentence * * * is grossly inadequate * * * Murder, whether with a gun or an automobile calls for penalties that will properly punish the offender and stand as a clear warning to others. This sentence does neither * * * the safety of the careful * * * rather than any hardships suffered by the guilty drivers * * * should be the paramount consideration. The **criminal negligence** responsible for the continuing slaughter on the highways **will not be cured until all culpable parties know their punishment will be sure, swift and severe.** Light penalties will delay the achievement of real highway safety." (Emphasis supplied.)

April 18, Rel. Ex. No. 48, under the title "If 'Sob Sisters' Lay Off", the editor declared, "* * * three of the holdup men * * * captured here, with an arsenal in their car, and sentenced in Philadelphia this week for crimes here * * * will be out of circulation and mischief for a term of years long enough to give them time to realize that crime doesn't pay * * * and * * * serve as a lesson to others. They were sentenced to from ten to thirty years in the Eastern Penitentiary by Judge * * * McDevitt * * * who commented that they would probably 'wind up in the electric chair'. The judge made it clear that he has little hope that characters of their ilk will not (sic) learn the needed lesson * * * and must be restrained from further victimizing the public. 'You wise guys start out with guns and usually wind up in the electric chair', * * * Unfortunately, despite adequate proof that the statement was not an exaggeration in many instances, there still are judges and Pardon Boards not yet convinced that thugs of that type should not be given an early opportunity to prey on the public. It seems to be the time to stop making guinea pigs of the law-abiding members of society."

May 7, Rel. Ex. No. 49, under the title "Jurors Rebuked Again", the editor pointed out that another jury in Philadelphia acquitted a man caught with his arm through a broken window and in possession of a set of burglar tools. It was not clear whether or not his past record was offered in evidence. Speaking again of the Hallowell case the editor suggested the possibility of having professional jurors.

May 25, Rel. Ex. No. 57, under the title "Mercy is Overdone", a news

story quoted Mr. Justice Jackson's criticism of the majority decision in the Homer Price case, Price v. Johnson, 334 U. S. 266 at 295.

June 5, Rel. Ex. No. 78, another news item, "Three Philadelphia Youths lived near Zeitz and Foster * * *" One of those arrested was one Robert White, 18, charged with breaking and entering and stealing a radio.

After the Darcy jury was selected and sworn: June 8, Rel. Ex. No. 84 included a reprint of an editorial from the Philadelphia Evening Bulletin: "Cries of 'maudlin sympathy' * * * last Fall * * * women * * *, on jury * * * blamed * * * No such cries are being heard as the result of two murder verdicts * * * In Doylestown two youths were sentenced by a jury to be executed for murdering a man after a holdup in Feasterville. In Philadelphia another jury, which had nine women among its members, voted a similar penalty in convicting the slayer of a policeman. Four women were on the jury in Doylestown. These verdicts are a vindication of women as jurors, and afford convincing evidence that opinion on use of the death penalty is not determined solely by sex. **Members of these juries deserved the commendation they received from the trial judges.**" (Emphasis supplied.)

June 10, Rel. Ex. No. 90, on the same subject the editor of the Doylestown Daily Intelligencer under the title "Verdicts Highly Praised" stated "Newspapers and individual citizens have in the past week highly praised the jurors who returned a verdict calling for capital punishment for three convicted killers. And on those juries were women in each instance. The Almeida verdict in Philadelphia and the conviction of Zeitz and Foster for murder in this county have been universally lauded. This endorsement of the extreme punishment for callous killers indicates very definitely that the public has become disgusted with the pampering of vicious criminals, although that was clear earlier. Earlier the jury which convicted a Philadelphia murderer in the first degree * * * but only designated life imprisonment * * * was subjected to a storm of denunciation by a great many persons. Imposition of capital punishment may not end all murders, but it does intimidate a great many potential killers."

Finally on June 12 Judge Boyer sentenced Robert White in another court room than that in which Darcy was being tried, out of the hearing and without the knowledge of the Darcy jury.

June 17, Rel. Ex. No. 105, "Raus Mit 'Em"; "Judge Calvin S. Boyer's warning to tough crooks from Philadelphia and other places to keep out of Bucks County or take the consequences * * * should be impressive * * * because recent juries of men and women convicted three trigger happy young holdup men involved in the killing of a respected resident of Feasterville, without provocation, and recommended their execution in the electric chair. The warning has been given before, but not under such impressive circumstances. At any rate the jurors in the Feasterville slaying case probably indicated the reaction of people in this county to the vicious lawlessness of a great many

was one of giving the public the news, the facts to which they were entitled, having in mind the regular as well as the occasional reader.[47] Overall there was a sincere effort

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young crooks who have operated in the county. Convictions of even murderers in the first degree with the death sentence have not been numerous in recent years * * * which should convince potential bandits and killers that leniency on the part of jurors is not likely to be easy to get. For a long time jurors or the court have made it clear that they wanted to give the young offenders every chance to show that they would reform * * * but the evidence appears to unmistakably indicate that Bucks countians have concluded that leniency has merely been taken as an indication of weakness. The conviction of the three young men for a wanton and unprovoked murder * * * the imposition of the death sentence * * * together with Judge Boyer's warning * * * it is to be hoped will cause bandits and killers to steer clear of the county. Getting tough has worked that way in other instances."

* Out with them—see and cf. A Dictionary of the Non English Words of The Pennsylvania German Dialect by Marcus Bachman Lambert (1924) Lancaster Press, Lancaster, Pa.

47 "The Gossiper", Jan. 16, Rel. Ex. No. 25, contra police chiefs, suggested a solution of juvenile delinquency, i. e., to exclude mystery and thriller stories from the radio. Danger of censorship spreading to books, plays, and the press; suggests gangs, adventure, easy money, sex crimes, mental problems, lax law enforcement, soft treatment, failure to place in institutions, as causes. Advantages of freedom of the press. "If * * * subnormal were given institutional care * * * and the courts and jurors were to dispense with a lot of sentimentality about criminals * * * the general public would not face so many horrible crimes as horrify newspaper readers daily." Jan. 16, Rel. Ex. No. 26, defendants given supervised recreation. Jan. 21, Rel. Ex. No. 27, "Crime is a One Way Street, the Street of Regret", suggests that this warning should be read by every juvenile and many adults. Gangsters may come even from fine parents and fine homes, citing as an example Dutch Schultz whose teacher predicted he would have a bad end. April 3, Rel. Ex. No. 47, futility of attempts to avert publicity when charged with drunken driving. Jail and publicity deter crime. May 28, Rel. Ex. No. 63, bus ride for jury. June 10, Rel. Ex. No. 80, stressing the beauties of the rural area. June 5, Rel. Ex. No. 79, as to the numbers making homes in Bucks County and commuting to Philadelphia. June 12, Rel. Ex. No. 97, defendant's escapades understandable in light of present day movies and radio. June 14, Rel. Ex. No. 100, Darcy's reaction to sentence compared to

to put out a good newspaper, following time honored traditions, in the exercise of a constitutional freedom—the Freedom of the Press.

In neither case was there any testimony offered on defendant's side of the case.[48] Foster and Zeitz, although afforded an opportunity by the court, the jury being absent, declined to testify. Darcy did not testify.

The strategy of respective trial counsel for the defense, other than Zeitz, was to show that their client did not fire the fatal shot and, as to all the defendants, to work toward and hope for keeping the punishment down to life imprisonment instead of the death penalty.[49]

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that of others in the past. June 13, Rel. Ex. No. 106, suggests that even nailing things down may not stop thieves, citing examples. May 26, Rel. Ex. Nos. 59, 60, questions on voir dire indicate that the Commonwealth may ask for the death penalty. Rel. Ex. Nos. 63, 64, May 28, in opening the District Attorney left no doubt he will ask for the death penalty in his next speech to the jury. Rel. Ex. No. 70, June 2, "Slowly but carefully the Commonwealth is leading up to the point when it will ask that the jury demand that Zeitz and Foster pay with their lives * * *." Rel. Ex. No. 85, June 9, in opening the District Attorney did not mention the death penalty. He asked for it in the summation of the Foster-Zeitz trial. In re High School Commencement, see Rel. Ex. No. 79, Saturday, June 5, Rel. Ex. No. 88, June 10, time and place of exercises; rescheduling not mentioned, cf. Rel. Ex. No. 93, June 11. There was evidence offered as to when the change, if any, was made.

[48] N. T. Foster-Zeitz 1295-1297, Rel. Ex. No. 72, June 3, N. T.-T. 860, Rel. Ex. No. 94, June 12.

[49] Rel. Ex. Nos. 75, 76, Attorney Rubin, "* * * true * * * a Jesse James couple. The Commonwealth want to send these boys to their death. Zeitz, I am certain, is a victim of an unsettled age. I would certainly urge you that life imprisonment and not the death penalty would be proper in this case * * *. They are not desperados; they are 'trigger happy kids', the victims of extreme juvenile delinquency and the times". The District Attorney replied, "Yes, they are a sorry lot today, but they were as brazen as they could be during this trial and during their escapades of crime. There is nothing, in the opinion of the Commonwealth, that would justify anything less than the supreme penalty, which the Commonwealth is asking."

After the closing pleas of counsel [50] and the charge of the court on the law and the evidence,[51] a verdict of guilty of

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June 14, Rel. Ex. Nos. 98, 99, the District Attorney argued that the defendants' conduct was atrocious and vicious, that they morally murdered three men, Kelly dead, the other two disabled, one for life. "The Commonwealth * * * thinks you will have * * * no trouble in finding the defendant guilty of murder in the first degree. I challenge the defendant to put any mitigating circumstances in this case and we argue that the supreme penalty should be paid." Mr. Achey: Darcy killed no one, therefore he should not pay with the death penalty. "I do not think Darcy is guilty of a cruel and deliberate murder * * *. There is no doubt that a man was killed, and that it was during the perpetration of a robbery, and for that reason the crime of first degree murder has been established, but we ask you to fix the penalty at life imprisonment."

[50] N. T. Foster-Zeitz 1297, the District Attorney first; limited in rebuttal. N. T.-T. 862. On defense counsel's objection, the District Attorney closed first and was allowed no rebuttal.

[51] Judge Boyer waited until Friday to charge so the jury would have a full day ahead to deliberate; advised that only two defendants were involved; stressed the care with which the jury was selected; explained that they were kept together to assure a fair and impartial trial; that they were the judges of the facts; consider each defendant separately as to guilt and penalty; may consider evidence of Deacon Inn robbery to determine whether defendants committed robbery at Feasterville Inn; if their verdict was guilty of murder in the first degree, with evidence of other offenses in determining punishment or penalty; draw no unfavorable inferences from defendants' failure to testify; presumption of innocence; burden of proving guilt beyond a reasonable doubt. Toward the end of the charge Judge Boyer said, "If you find that it was a murder committed in the perpetration of a robbery, then your verdict should be murder in the first degree." "The punishment or penalty * * * is) * * * left largely to the sound discretion of the jury" (p. 1330). "* * * youth alone does not excuse them from responsibility for their acts * * * (or) * * * from just punishment therefor * * *" (p. 1334). If during the charge the court expressed any opinion on the facts or the conclusions to be drawn therefrom, they were not bound by the court's opinion. "Those matters are for you to form opinions on * * *. In the opinion of the court if you find these defendants, or either of them, guilty of murder in the first degree then the death penalty would be the just and proper punishment for the crime. However, we again remind you that the question is entirely for you and you are not bound by the opinion of the court."

Exception was taken to the court's expression of opinion as to penalty.

After argument but before decision on defendants' motions for a new trial, illness overtook Judge Boyer, incapacitating him from further service, resulting ultimately in his resignation and death. Upon reargument before Judge Keller and Judge Fred W. Davis, 43rd Pennsylvania Judicial District, specially assigned, the motions were denied. Judgments of conviction and sentence were affirmed; Com. v. Foster, March 20, 1950, 364 Pa. 288, 72 A. 2d 279; Com. v. Zeitz, March 20, 1950, 364 Pa. 294, 72 A. 2d 282. Each opinion held that Judge Boyer did not exceed the bounds of propriety so long as the question was left to the decision of the jury. Mr. Justice Jones dissented: (a) evidence of other crimes unrelated to questions at issue and were improperly admitted, but see Com. v. Darcy, 362 Pa. at 286; Com. v. DePofi, 362 Pa. 229; (b) a trial judge should not express any opinion as to the penalty, a question solely for the jury.

Judge Keller commended the patient, careful, undivided attention given by the judge throughout the trial; pointed to the careful, searching examination to obtain jurors who would weigh, consider and pass upon the evidence in a fair, impartial, and dispassionate manner, uninfluenced by sympathy, prejudice, passion or emotion, or by anything other than the law and the evidence; instructed the jury that they were the sole judges of questions of fact; that the facts should be determined only from evidence submitted at the trial not from anything they may have read or heard from any other source; the defendant had a right under the law to be tried separately; they should draw no unfavorable inferences from defendant's failure to testify or offer evidence in his behalf. The court did not review the testimony in detail, stating that it had already been covered by the District Attorney and Mr. Achey, "both able and learned men". The purpose of the testimony as to all other crimes was limited to their possible use in fixing the penalty. After defining murder at common law and under the Act of March 31, 1860, P. L. 382, as reenacted in the Penal Code of June 24, 1939, P. L. 872, 18 P. S. §4701, and explaining the difference between murder of the first and second degrees, the court stated that the true criteria and essence of murder in the first degree was the intent to kill; lacking an intent to kill it would be murder in the second degree. Although the court's explanation of the felony murder doctrine was legally correct, there was a possibility that a layman would under all the circumstances consider that, lacking an intent to kill, the verdict should be guilty of murder in the second degree. At N. T. 904, the court said, "I may say that the law and the courts recognize a distinction as to the penalty to be inflicted in murder of the first degree, and our Supreme Court is on record as stating that when a murder is committed in the course of a robbery, the death penalty, in the absence of mitigating or extenuating circumstances is, to say the least, not viewed with disfavor by the law.

In determining the question as to what the penalty shall be, in

murder in the first degree fixing the penalty at death was returned by the jury in each case.

After the verdict was recorded at 1:45 P. M. June 4, Judge Boyer was reported (Rel. Ex. No. 78, June 5) as having said to the jury: "I don't see how you could, under the

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the event you convict the defendant of murder in the first degree, it will be entirely proper for you to take into consideration whether or not there are any extenuating or mitigating circumstances as to the defendant's guilt in this case.

Members of the jury, we do not wish to be understood that we express any opinion as to what your verdict shall be or what, in the event of a verdict of guilty of murder in the first degree, what the penalty shall be. That is your problem and your duty as you may conclude from the evidence and the law as we have given it to you."

Thereupon the following ensued: "Have I overlooked anything?" Mr. Achey: "Nothing for the defendant, Your Honor." After a few brief remarks by the court—Mr. Biester: "Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree." The Court: "I specifically stated it was completely abandoned in the case of flight or escape. That becomes important only, members of the jury, if you are convinced beyond a reasonable doubt that this shooting of Kelly did not occur during the perpetration of a robbery." Mr. Biester: "I am sorry, but I don't think that would be beyond a reasonable doubt, that it would be on the preponderance of the evidence that it was during the commission of a robbery. I think your Honor inadvertently said that they would have to believe that beyond a reasonable doubt that it was not." The Court: "If I did, that will be withdrawn." Mr. Achey: "I ask for an exception, a general exception, to the charge of the court." The Court: "Exception will be allowed." (Exception noted for defendant.) It was a timely suggestion, the need of which would be apparent to any experienced trial lawyer. District Attorney Biester was an assistant district attorney from 1932 to 1938; District Attorney from 1938 to the time in question (appointed August 16, 1949, to fill the vacancy left by Judge Boyer's resignation). There was obviously no need of a suggestion from outside sources.

June 15, "Observing attorneys offered the opinion that the jurist's charge was 'most fair' to the defendant." Rel. Ex. No. 102.

Following the verdict, a timely motion for a new trial was made on the sole ground of error in the admission of evidence of prior crimes.

evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision."

To place these remarks in their proper context: A few moments earlier in the same court room Judge Keller in discharging the remainder of the May 24 panel commended them for their satisfactory verdicts, the last one of which was an acquittal on a charge of rape. An opinion expressed by Judge Boyer in his charge as to the proper penalty was reported on June 4, Rel. Ex. No. 76.

In convictions for murder the sole, absolute and final responsibility for the verdict and its consequences rests with the jury. Here no question was raised as to identity or as to the defendant's participation in the robbery. The confessions were not repudiated; the testimony was uncontradicted. In the opinion of the Supreme Court of Pennsylvania Zeitz "showed extreme callousness and brutality in his actions and his remarks during the course of the holdup"; Com. v. Zeitz, 364 Pa. at 296; the three defendants were described as "bandits". Id. p. 296. And see opinion Chief Judge Biggs, 203 F. 2d at 419, "The crime * * * admittedly committed was a brutal one, meriting severest moral condemnation * * *"; Com. v. Darcy, 362 Pa. at 278, "Under this evidence for a jury not to have found that these men were engaged in a common law robbery would have been perverse."

Monday, June 7, court was called at 10:00 A. M. with both judges presiding. After some miscellaneous business

was disposed of; the defendant was arraigned, plead not guilty, and upon Judge Keller's direction selection of a jury was commenced at 10:15 A. M. As to the voir dire examination, see supra and see opinion Maris J., supra, 203 F. 2d at 423; Resp. Ex. No. 5, Par. 13, "Each juror * * * called * * * carefully examined and cross examined * * * in order that the defendant might be tried by a jury free of bias, prejudice or preconceived opinion regarding the guilt or innocence of the accused. * * *"

Defendant was represented by Webster S. Achey, Esq. and William M. Power, Esq., residents of Doylestown, engaged on defendant's behalf. Attorney Achey, at one time an Assistant United States Attorney for the Eastern District of Pennsylvania and engaged in the practice of the law for some thirty years, was one of the ablest and foremost active trial lawyers of Bucks County. His ability as such was recognized throughout the eastern section of Pennsylvania (see Resp. Ex. No. 5). In his charge the trial judge described him as "able and learned"; the Supreme Court of Pennsylvania (367 Pa. at 133) as "a highly reputable attorney of his own (Darcy's) choosing, eminently qualified from the standpoint of ability, experience and industry." Attorney Power "while a young man with less experience was a very good trial lawyer" (Resp. Ex. No. 5).

From early March defense counsel knew that the Darcy trial would follow that of Foster and Zeitz. At no time did they make any objection to this arrangement. We assume that they were aware of current local events[52] (cf. N. T.-T.

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[52] June 4, Rel. Ex. Nos. 75, 76 (speculating that Darcy would plead guilty if the Foster-Zeitz verdict was life imprisonment go to trial if it was death; speculation as to cost of prosecution). Rel. Ex. No. 77 June 5, Rel. Ex. No. 78 (2 items); Rel. Ex. No. 79 (a one paragraph item on p. 3, "Police official quoted as saying that, if the killers of Kelly were not given the death sentence, the electric chair should be

260-261, they knew about the venue statute; N. T.-T. 831, and Judge Boyer's remarks of June 4). They were also then confronted with the status of the law in Pennsylvania and the pronouncement of the Pennsylvania Supreme Court in Com. v. Flood (1930), 302 Pa. 190 at 196, "While defendant's right is clear, those of society are also clear; it is important that their interests should be protected against unnecessary delays. Persons accused of crimes should be brought to as speedy a trial as the exigencies of their cases demand, otherwise one of the benefits accruing to society will be lost or seriously diminished. Delays through unwarranted or unnecessary continuance should cease." Com. v. Skawinski (1934) 313 Pa. 453, denial of application for change of venue, Act of March 18, 1875, P. L. 30, 19 P. S. 551, and of a motion for a continuance; Com. v. Riggs (1934) 313 Pa. 457, quite like the present situation; Com. v. Smith (1898) 185 Pa. 553 at 557, 558, 40 A. 73; Com. v. Buccieri (1893) 153 Pa. 535 at 545, 26 A. 228, "A very gross abuse of this discretion would have to appear." "The question of change of venue is one peculiarly within the sound judgment of the (trial) court," Id. at 546; Com. v. March (1915) 248 Pa. 434, 438, 94 A. 142; Com. v. White (1922) 271 Pa. 584, 589, 115 A. 870; Com. v. Schurtz (1940), 337 Pa. 405 at 409, 410, 10 A. 2d 378; Com. v. Shadduck (1951), 168 Pa.

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destroyed * * *", and his opinion being agreed with by those who heard the statement). June 7, Rel. Ex. Nos. 80, 81, editorial. Philadelphia Evening Bulletin, see footnote 46, supra, p. 27. June 8, Rel. Ex. No. 82, published at 1:30 P. M., reported the names of the 12 jurors selected—8 of them before adjournment on June 7—2 alternates were selected before 2:00 P. M. Rel. Ex. Nos. 83, 84, reprint of Evening Bulletin editorial of June 7. While the 4 jurors and 2 alternates selected on June 8 conceivably could have seen the Bulletin editorial of June 7—of which there is no evidence—the local paper of June 8 was not available to any of the 14. Id. as to all other newspapers, magazines, or other reading material, except the evidence, for the remainder of the trial.

Super. Ct. 376, 77 A. 2d 673; and see Hart v. United States (1940), 5 Cir., 112 F. 2d 128 at 131; Paschen v. United States, 7 Cir. 1934, 70 F. 2d 491 at 494; cf. Com. v. Karmendi (1937), 328 Pa. 321 at 337, 338-340, see 342 and particularly 349, 350, 351; and see our opinion in United States v. Handy, supra, 97 F. Supp. 930 at 935. The time and place to ascertain the existence of any disqualification was on the voir dire. See Id. 937; United States v. Handy, 203 F. 2d 407 at 423; Com. v. Pasco (1938, 332 Pa. 439, 2 A. 2d 736; United States v. Rosenberg (1952), 200 F. 2d 666 at 668, 669, particularly apposite; United States v. Moran (1952), 2 Cir. 194 F. 2d 623 at 625; Allen v. United States, 7 Cir. (1925), 4 F. 2d 688 at 695, 699; see Reynolds v. United States, 98 U. S. 145, 155, 156, "The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits * * *. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. * * * jurors not unfrequenly seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. * * * The affirmative of the issue is upon the challenger."

As to what constitutes disqualifications of a juror, in Pa., see Com. v. Zell and Herr, 81 Pa. Super. Ct. 145 at 148, "The presumptions are * * * that all the jurors selected were * * * sober, intelligent and judicious persons; * * *

selected from the whole county * * * free from local influence or prejudice." "The law upon this subject has necessarily advanced with the changed circumstances; it has merely kept abreast of the times, and adapted itself to what the common judgment and common sense of the people see is essential to the proper administration of the criminal law. To return now to the old rule, would exclude from the jury box in many instances every man of average intelligence.". Rizzolo v. Com. (1889), 126 Pa. 54 at 72, 72. "Intelligent men receive impressions as to the nature and character of any transaction from what they hear and read of it, and it is not unusual to speak of these as opinions." Com. v. Crossmire (1893), 156 Pa. 304 at 308. "We have held repeatedly * * * that the test of the competency of a juror in a capital case is his ability to render a verdict upon the evidence, and upon the evidence alone, uninfluenced by any opinion which he may have previously formed from newspapers or other reports of the crime * * *. In Allison v. Com., we held that where a juror in a criminal case has formed an opinion from hearing or reading the evidence upon a former trial, he is incompetent, even if his opinion thus formed does not come up to the standard of a fixed opinion. But this rule does not apply where the juror has heard or read only fragmentary portions of the evidence; on the contrary, his opinion must have been formed upon all the evidence in the former trial against the same prisoner, before the disqualification referred to attaches; and it was distinctly ruled in the same case (Allison v. Com., supra), that hearing or reading the evidence upon a preliminary examination * * * was not a trial within the meaning of this rule. We need not discuss this question further. It is worn threadbare, and the law ought to be now well understood." Com. v. Taylor, 129 Pa. 534 at 540, 541. "Ig-

norance of everything except the facts testified to by witnesses in the case on trial is not a constitutionally required qualification of American jurors." Com. v. Darcy, 362 Pa. at 271. "* * * challenge of a juror for cause is addressed to the trial judge * * * much weight must be given to his judgment in passing upon it. In exercising his discretion as to the fitness of a juror to serve, he has the juror before him, and much latitude must be left to him; * * * the weight to be given to the answers of a juror when examined on his voir dire is not to be determined exclusively by his words as we read them in the printed record * * *. Nothing short of palpable error will justify a reversal of a trial judge in passing upon a challenge for cause." Com. v. Sushinskie, 242 Pa. 406 at 412, 413.

Whether he should have moved for a continuance or a change of venue was obviously, as every lawyer knows, a matter of judgment to be decided in the light of the circumstances as measured by various considerations of trial policy. Defense counsel chose not to do so. What change any delay in the trial would have produced is pure speculation. In fact, in examining the witnesses in the Darcy trial, defense counsel on occasion referred to the testimony of the previous trial. See e. g., N. T.-T. 324-367. What of the wisdom of his choice? "It is a familiar observation that cases are better tried from the 'side lines' by lawyers who would do no better in the heat of the conflict if they conducted the trial. And of cousre it is easy to condemn the exercise of counsel's judgment, after the case is lost which would be praised if the case were won: But no lawyer can be expected to do more than exercise a reasonable skill which cannot be fairly judged by the result of the trial alone." Com. v. Thompson, 367 Pa. 102 at 109.

Assuming arguendo, there was some evidence of hysteria

and prejudice,[53] see and cf. 203 F. 2d at 423, where Judge Maris sagely observed, "* * * a jury trial, just as every other human enterprise, is a fallible proceeding. Every juror who has ever been empaneled has been subject in greater or lesser degree to human passions and prejudices. These he is required to lay aside when he takes his oath as a juror. How successfully this is accomplished in practice has always been a matter of dispute but the deep and abiding place which the jury system has achieved in our institutions attests the fact that the standard of impartiality has normally been attained to a degree which is satisfactory to the community." And see Com. v. Buccieri, supra, 153 Pa. at 546, "Indignation, because of the cruelty of the deed, there doubtless was; it would be strange if such were not the case in a law abiding community; but there is nothing which convinces us of the existence of such passion or prejudice as would prevent the twelve 'sober, intelligent, and judicious' jurors who were sworn to try the issue from rendering a true verdict on the evidence." There was some testimony as to some people being shocked; some indig-

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[53] The trial judge certified that there was no hysteria or prejudice either before, during or after the trial. See Resp. Ex. No. 5, Par. 18. Id. par. 23, "* * * the same conditions prevailed as in the Darcy trial, in that it was quiet, orderly, and free from any disturbance, displays of excitement, prejudice, or evidence of any emotional outbursts or hysteria whatsoever." Id. par. 24, "Although the proceedings of both of the trials of Harold Foster and Harry Zeitz and that of David Darcy were publicized through the local and county newspapers as well as Philadelphia, Trenton, and possibly some other newspapers, these reports were read and received as a matter of news by the residents of the county, and the undersigned, a resident of Doylestown, neither heard nor saw any manifestations of hysteria or prejudice having swept the town as the result of these newspaper stories. Furthermore, in view of their answers under oath during their voir dire examination, the undersigned is convinced that the jurors selected had not been influenced by any newspaper stories, radio or other news reports or by any manifestations of prejudice or hysteria against the defendant."

nant; other testimony that some people in certain parts of the country, particularly in the Feasterville area, not many overall, had ideas as to what the punishment should be. In this connection it must be remembered that Bucks County was one of the three original counties established at the first settlement of the province of Pennsylvania in 1682 (land area 617 sq. mi.; pop. 1950—144, 620, 1940—107,715; pop. per sq. mi. 234.4; urban 24.1% 1950, 29.4% 1940, Pa. Manual, Vol. 91, 1953-1954, pp. 994, 997).

Defendant's counsel apparently made a deliberate choice not to seek delay or a change of venue. Many reasons could be suggested for their decision. We will not indulge in speculation. At all events there was a waiver of any right they may have had.

"* * * it * * * is for the Pennsylvania courts to say under its law what duty or discretion the court may have had. Nothing in the record impeaches the fairness and temperateness with which the trial judge (and we add the District Attorney) approached his task. His action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question." Gryger v. Burke (1948), 334 U. S. 728 at 731.

"If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but

as a demonstrable reality." Adams v. United States ex rel. McCann, 317 U. S. 268 at 281. This the relator has not done.

Finally as to Judge Boyer's asserted visits to the court room. (Hon. Calvin S. Boyer was for some years District Attorney for Bucks County; later United States Attorney for the Eastern District of Pennsylvania, and from June 21, 1930, to sometime in 1949 additional law judge of the several courts of Bucks County. Rel. Ex. No. 124, p. 754.) From the time of the occurrence and throughout the Foster-Zeitz trial Judge Boyer's conduct was fair and impartial. In fact, the only time his name appears in connection with the indictment was on March 1 when the court suggested the possibility of a joint trial; again on March 3 when Judge Boyer promptly complied with a request therefor naming two lawyers to represent Harold Foster. On the question of admissibility of evidence of other offenses Judge Boyer restricted the Commonwealth to a purpose narrower than that approved by the Pennsylvania Supreme Court on appeal.

By long established tradition in Bucks County, each morning and afternoon at the opening of course both judges take the bench to entertain motions and other miscellaneous matters in the Criminal, Common Pleas—law and equity—and Orphans Court. Once this work is completed, one of the judges, if engaged in a trial in that court room, remains on the bench; the other judge leaving to perform duties in another court room or in chambers. The practice used in many Pennsylvania courts, N. T.-H. 365, was continued daily no matter what court was in session or the nature of the trial, see Rel. Ex. No. 115, p. 8; not on June 4 when Judge Boyer charged the jury; and, according to Rel. Ex. No. 116, not on June 8 and 10.

The criminal docket, Rel. Ex. No. 10, a record of individual trials, shows both judges on the bench at 10:00 A. M. May 24 (p. 339); 9:30 A. M. June 2 (p. 348); 10:00 A. M. June 7 (p. 352). The court reporter's notes of testimony show only one instance of Judge Boyer taking any part whatsoever in the Darcy trial, i. e., during a sidebar discussion out of the hearing of the jury shortly after court convened on Saturday morning, June 12 (N. T. 827). Under consideration was a difficult question of law on the admissibility of evidence of other offenses (see Resp. Ex. No. 5, par. 20) in view of the Act of July 3, 1947, P. L. 1239. Judge Boyer indicated his thinking on the matter. Upon objection by counsel[54] the discussion ended; Judge Keller ruled; Judge Boyer left the bench shortly after and did not return during the remainder of the trial.[55] It may be that during the Foster-Zeitz trial Judge Keller shortly after 9:30 A. M. June 2 (cf. Rel. Ex. No. 1, N. T. 1194) listened

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[54] "Judge Boyer: That applies only to cross-examination.

Mr. Achey: I object to Judge Boyer sitting in on this case. I don't mind trying against one judge ——

Judge Boyer: The judges reserve the right to confer without being obliged to get the consent of defense counsel.

Mr. Achey: In view of the statement which Judge Boyer made to the jury in the trial of Foster and Zeitz, which was tried last week, I submit that he has disqualified himself from sitting in on this case, and it is prepudicial to the defendant. My objection, further, to the offer, is that the evidence of the commission of other crimes is not permissible in this particular case because it is restricted by the amendment of the Act of 1947.

The Court: The objection is overruled.

(Objection noted for defendant.)"

End of sidebar, N. T. 831. Any statements made at sidebar were unknown and never called to the attention of the jury. Resp. Ex. No. 5, par. 21.

[55] The statements were admitted for a more limited purpose than the Supreme Court of Pennsylvania approved on appeal. See Com. v. Darcy, 362 Pa. at 283.

to but did not express any opinion during a similar discussion.[56]

Honorable Hiram H. Keller, president judge since April 30, 1930, who presided with eminent fairness throughout the trial, has certified Resp. Ex. No. 5, par. 20-21) that after the miscellaneous business was completed, "On several occasions * * * Judge Boyer remained for brief periods while of the incident reported at N. T.-T. 831, "At no other time, evidence was presented * * *," and that with the exception during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the undersigned in the trial of this case."

The District Attorney, now Judge Biester, testified, and we find as a fact, that Judge Boyer did not at any time during the Darcy trial assist, attempt to assist, make any suggestion to or in any other manner aid the Commonwealth in the prosecution of the case against David Darcy; that Judge Boyer did not pass any note or message of any kind to the District Attorney in connection with the trial for the use of the District Attorney or Judge Keller.

On several occasions during the Darcy trial—not on Friday evening or during the charge of the court on Monday, June 14—Judge Boyer sat for brief intervals on a chair just inside the court room door from the judges' chambers, apparently listening to the proceedings. On several occasions during the Foster-Zeitz trial, Judge Keller sat for short intervals in the same area the judges in Bucks County did not at that time wear robes).

During the Darcy trial Judge Boyer did not at any time sit at or near the table reserved for the press; at or near the

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[56] As to other criminal matters between May 24-June 15; see Ex. Nos. 115, 137, a number of cases before Judge Keller May 24 to 27 and June 1 to 4 incl.; a number of defendants, one of whom was Robert White, before Judge Boyer June 11.

table reserved for the District Attorney; at no time did Judge Boyer sit on a chair next to or anywhere near a chair occupied by the District Attorney.

Throughout the trial, the only chairs occupied by the District Attorney or his assistant were at the table reserved for that purpose, or in chairs immediately in front of the table reserved for the press.

At no time other than that noted in N. T.-T. 830 did Judge Boyer take any part whatsoever in the proceedings of the Darcy trial.[57]

Friday, June 12, Judge Boyer in sentencing Robert White, 18, one of three Philadelphia youths, for stealing a car radio, to four to twelve months, was reported (Rel. Ex. No. 94) to have said: "We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which isn't being watched * * * what business did you have to come up here in the first place? * * * So far as your testimony is concerned, you have not shown any excuse at all to come out of Philadelphia to Bucks County. * * * Have you heard what's going on downstairs? Do you want to end up like that?"—" 'I'd like to have another chance,' said the youth whose mother described him as a 'good boy'." "We in Bucks County are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it." Said Judge Boyer, "Unless you get an entirely different idea or conception of what belongs to

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[57] Before the closing pleas in the Foster-Zeitz case Judge Boyer did not say, "Now we will be able to start the Darcy case next week." He did not tell school children—with the jury present—that the defendants were going to be convicted of murder. See N. T.-H. 759, 918 and 382. Judge Boyer did not discuss the pending case or the defendants with the witness Davis. N. T.-H. 430, et seq. Credibility is for a trier of the facts. See Hawk v. Olson, 326 U. S. 271 at 279.

you and respect for other people's property you will have a sorry life." If one recalls the arrest on February 16 of six young Philadelphians on serious charges (see note 46, supra, p. 25, 26, 27), making ten youngsters in the County Prison at that time, and the arrest of the three in question on June 5, Judge Boyer's remarks may be appraised in a different light than one of condemnation. The sentence was moderate under the circumstances. At all events the sentence was passed and the remarks made in a court room other than that in which the Darcy trial was progressing. The jurors in the Darcy trial knew nothing whatsoever as to the sentence and the remarks. What occurred could not possibly have, and did not in fact have, any effect whatsoever on the outcome of the Darcy trial. It did not reflect in any manner hysteria or prejudice on Judge Boyer's part toward any of the four defendants charged with murder.

After the verdict in the Darcy trial was recorded and the jurors dismissed with the thanks of the court, there was no display of any kind in or outside the court room.[58] It was reported (Rel. Ex. No. 102) that as the spectators left the court house there was widespread comment approving the verdict and the efficient manner in which the Commonwealth had prepared its case. "They seemed to 'pity the parents; not the defendants' in this case."

The respondent moves to dismiss on the ground that the

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[58] June 8, Rel. Ex. No. 82, June 11, Rel. Ex. No. 91, June 12, Rel. Ex. No. 94, reported efforts of defense counsel to keep evidence of other offenses from the jury. June 10, Rel. Ex. No. 90, see note 46, supra at p. 27, an editorial praising the Foster-Zeitz verdict; June 12, Rel. Ex. No. 94, a news item as to a friend of Darcy's being arrested on his way to the trial; June 14, Rel. Ex. No 98, awaiting verdict; June 15, Rel. Ex. No. 101, report on verdict; suicide rumor false, Rel. Ex. No. 102, speculation on cost of prosecution. And see "Bucks County Justice" as a term of approval. June 17, Rel. Ex. No. 103, in re possibility of error in rulings in murder trial.

evidence is insufficient in quality and quantity to support the allegations of the petition.

After "in a sense" traversing the highways and byways of Bucks County; spending long hours in its newspaper columns, and on the editorial and other pages; listening to reports as to the sentiments of its people in Doylestown and throughout the county (see amendment of the petition, N. T.-H. 393), fully aware of its long tradition as a law abiding community; pondering on the results in the light of Section IX of Article 1 of the Pennsylvania Constitution and Section I of the Fourteenth Amendment of the United States Constitution, we have fully and completely complied with the mandate of the Court of Appeals. With what result? Only to be more confirmed in our conclusions expressed in our opinion on May 17, 1951, that the defendant was afforded in form and in substance a fair and impartial trial in the Court of Oyer and Terminer in Bucks County, Pennsylvania, in June, 1948; that the allegations of the petition for habeas corpus are without support in the record and in the evidence; that the defendant was afforded due process of law under the Constitution of Pennsylvania and the Constitution of the United States.

There is nothing here akin to Shepherd v. Florida, 341 U. S. 50, 51; Frank v. Magnum, 237 U. S. 309 at 355; Moore v. Dempsey, 261 U. S. 86; see Ashe v. Valotta, 270 U. S. 424, 426; and see Stroble v. California, 343 U. S. 181 at 193, 194; Buchalter v. New York, 319 U. S. 427 at 430; United States v. Rosenberg, 200 F. 2d 666.

As Mr. Justice Cardozo said in Snyder v. Massachusetts, 291 U. S. 97 at 122, "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament: We are to keep the balance true * * *. There is danger that the criminal law will be brought into contempt—that discredit will

even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

The findings of fact and conclusions of law submitted by relator and respondent as are in agreement with this opinion are hereby adopted and affirmed. Such findings of fact and conclusions of law submitted by the relator and respondent as are in disagreement with our opinion are hereby denied.

The petition for a writ of habeas corpus will therefore be denied: our stay order heretofore entered on November 5, 1953, will be terminated and come to an end.

The Commonwealth of Pennsylvania so far as this court is concerned is free to pursue the proper legal processes to see that the sentence and judgment of the Court of Oyer and Terminer of Bucks County be carried out.

/s/ JOHN W. MURPHY,
United States District Judge.

February 12, 1955.

Albert L. Watson, Chief Judge, joins in all the views expressed in this opinion.

/s/ ALBERT L. WATSON,
Chief Judge, Middle District
of Pennsylvania.

(2).

APPENDIX TO OPINION.

As to Respondent's request for findings of fact: Affirmed —No. 1, pp. 16, 17; No. 2, pp. 15, 16; No. 3, p. 18, proper date May 27; No. 4, p. 17, see Slaughter incident, note 29; No. 5, p. 18, note 34; No. 6, p. 18; Nos. 8, 9, 10, 11, 12, 13, p. 20; No. 14 as modified, pp. 20-22; Nos. 15 and 16, p. 20; No. 17; No. 18 as modified, pp. 32, 39, 40, 41; No. 19, pp. 42, 43; No. 20, pp. 40; No. 21, pp. 31, 41; No. 22, p. 41; No. 23, p. 41. Denied No. 7 as stated, p. 19.

As to Respondent's request for conclusions of law: Nos. 1 to 6 inclusive are denied; No. 7 affirmed; No. 8 affirmed as modified.

As to Relator's request for findings of fact: No. 1, affirmed as amplified, pp. 11, 12; Nos. 2, 3, 4, denied, p. 23; Nos. 5, 6, affirmed as modified, p. 23; Nos. 7, 8, affirmed, p. 23; No. 9, denied; No. 10 denied, pp. 24-29; No. 10a, affirmed as modified and in context; (b) affirmed in context; (c) affirmed in context, p. 24, et seq., note 46 and 47; (d) affirmed as to heading, details of crime not repeated; (e) affirmed, p. 25; (f) affirmed in part, denied as to details; (g) denied as stated, p. 25; (h) denied as stated, affirmed as to quotes; (i) affirmed in context; (j) denied as stated, item misquoted, p. 28, note 47; (k) denied as stated, p. 28; (l) denied, p. 28; (m) denied as stated; (n. Ex. 31 denied as stated, title misquoted, p. 25, affirmed as to Ex. 30; (o) possibly misleading interpretation, defendants cases not mentioned; (p) denied, misleading and misquoted, correct as

to heading of news item, p. 25; (q) denied as stated; (r) denied as stated, p. 25, affirmed as to Ex. 39; (s) misquoted, see pp. 25, 26; (t) denied, p. 26; (u) denied; (v) a twelve line news item; (w) affirmed, p. 26; (x) conclusions denied; (y) misquoted, pp. 26, 27; (z) denied, p. 27; (aa) (cc) (dd) names of jurors only; (bb) substantially correct, p. 16, note 27; No. 11 denied as stated, see p. 23 as to coverage; No. 12 misquoted in part, pp. 31, 32; No. 13, quotes correct, one juror selected before noon; No. 14 denied, p. 24, note 44; No. 15 denied, misquoted, p. 24, note 44; No. 16 denied; Nos. 17, 18 denied, p. 21, note 40; No. 19 denied, p. 21; No. 20, denied; Nos. 21, 21a denied, p. 20, note 39; No. 22 denied, pp. 15, 39; No. 23 affirmed; No. 24, Ex. 51 misquoted. Ex. 55, 56 affirmed, but see p. 16, note 27; No. 25 denied as stated; No. 26 denied as stated, p. 28, note 47; No. 27 denied; Nos. 28, 29 affirmed; Nos. 30, 31 denied, p. 17; No. 32 affirmed, p. 18, note 33; No. 33 denied; No. 34 denied, p. 39; No. 35 denied, pp. 15, 39; No. 36 affirmed, p. 31, et seq.; No. 37 denied as stated, p. 42; No. 38 denied, see p. 39, et seq.; No. 39 denied, see p. 42, note 57; No. 39a denied, p. 41; No. 40 denied, p. 41, et seq.; No. 41 denied, pp. 40, 41; Nos. 42, 43 denied, p. 41; No. 44 denied, pp. 41, 31; Nos. 45, 46 denied, p. 39, et seq.; No. 47 denied, p. 39, et seq., and see p. 27, note 46; No. 48 denied, pp. 19 and 21, note 40; No. 49 denied, p. 18, notes 33, 34; No. 50 affirmed, p. 18, note 31; Nos. 51, 52, 53 denied, pp. 18, 19, 34, 35; Nos. 54, 54a, 54b denied.

As to Relator's request for conclusions of law: Nos. 1, 2, 3 denied; No. 4 denied as stated; Nos. 5, 6, 7, 8, 9, 10 denied.

/s/ JOHN W. MURPHY,
United States District Judge.

February 18, 1955.

VII.

ORDER OF UNITED STATES DISTRICT COURT. DENYING PETITION.

NOW, this 12th day of February, 1955, for the reasons set forth in an opinion handed down this date, relator's petition for a writ of habeas corpus is denied, and the stay order entered by this Court heretofore, to wit, on the 5th day of November, 1953, is hereby terminated.

/s/ JOHN W. MURPHY,
United States District Judge.

/s/ ALBERT L. WATSON,
Chief Judge, Middle District of Pennsylvania.

VIII.

CERTIFICATE OF PROBABLE CAUSE.

I, Harry E. Kalodner, Judge of the United States Court of Appeals for the Third Circuit, to whom application was made for certificate of probable cause in the above entitled cause, do hereby certify that there exists probable cause for the appeal.

/s/ HARRY E. KALODNER,
Circuit Judge.

March 4, 1955.

[fol. 1245] In United States Court of Appeals for the Third Circuit

No. 11,564

United States of America, ex rel. David Darcy, Appellant,

v.

Earl D. Handy, Warden of Bucks County Prison, Dr. Fred S. Baldi, Warden of the Western State Penitentiary, Rockview, and Carl H. Fleckenstine, United States Marshal for the Middle District of Pennsylvania

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued April 4, 1955

Before Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges

Opinion of the Court—Filed June 9, 1955

By Hastie, Circuit Judge:

In this habeas corpus proceeding the relator, a Pennsylvania state prisoner under sentence of death for murder, is contending that he was tried under such prejudical circumstances and improper influences that it becomes the duty of a federal court to invalidate the state conviction as a denial of due process of law and to order a new trial. [fol. 1246] The district court originally dismissed the petition without permitting relator to introduce evidence in support of his contentions. 97 F. Supp. 930. But on appeal this court ruled "that the relator must be afforded the opportunity to prove the allegations set out in his petition for habeas corpus insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at this trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, since the undisputed and incontrovertible facts as shown by the record do not countervail the allegations of hysteria and prejudice." 203

F. 2d 409. Accordingly, the case was remanded to the district court for a full hearing on the indicated issues.

In compliance with our mandate the district court permitted the parties to make an elaborate showing of the circumstances under which the relator was tried in Bucks County, Pennsylvania, for felonious homicide in the commission of an armed robbery. Although the relator had been contesting his conviction for more than six years, this was the first opportunity given him to introduce evidence to establish facts not apparent on the face of the original trial record which, in his view, would make clear that the trial was fundamentally unfair. In affording this opportunity, the district court devoted eight days to the testimony of more than thirty witnesses and the introduction of much documentary evidence. As a result, that court and this reviewing court now for the first time have been able to exercise fully informed judgment as to the essential fairness of the murder trial. It was specially important that this be done because there had been no taking of testimony on the relevant circumstances of the trial before any Pennsylvania state court in which the conduct of relator's trial had been challenged as essentially unfair. We emphasize this because we believe it is a virtue of our system of justice, as implemented by the due process clause of the Fourteenth Amendment, that it does not send a con-
[fol. 1247] victed person to his death without according him one full opportunity to present charges of unfair trial which are not patently frivolous. The important thing here is that relator has now had that chance. [illegible] the district court was satisfied that relator's new proof was insufficient to establish that his trial had been fundamentally unfair. — F. Supp. —. We agree with that conclusion.

Relator has attempted to show that he was tried in a community so aroused against him that a fair trial was impossible, or at best so unlikely that a decent respect must permit a second trial. Such a conclusion has been reached where the physical presence of a mob or a threat of mob violence has dominated a criminal trial. *Frank v. Mangum*, 1915, 237 U.S. 309; *Moore v. Dempsey*, 1923, 261 U.S. 86; *Powell v. Alabama*, 1932, 287 U.S. 45. But on

the evidence adduced in the district court it is clear, as that court found, that relator's trial was conducted with dignity and decorum and without any hostile congregation or demonstration at or near the place of trial. Indeed, during much of the trial the courtroom was not crowded. Certainly, the trial was not attended by any threat of violence or manifestation of mass hysteria. Moreover, a clear and elaborate showing was made to the district court that throughout relator's trial the jury was kept under strict guard, apart from other persons and without access to newspapers, radio, television or any other source of news or opinion.

However, the relator suggests that even though the jury was segregated and the community was outwardly calm during the trial, antagonism and hostility toward him were so great and widespread during the period immediately preceding the trial, that the probability of a prejudiced verdict from any jury of the vicinage was a greater risk than a society which insists upon equal justice under [fol. 128] law can take. A combination of unchallenged facts has made it very difficult for the relator to establish such extreme and pervasive hostility. The record of the original trial, which is before the court in this collateral proceeding, shows that each of the prospective jurors was subjected to a searching voir dire examination. The questioning of the fourteen persons who became the jurors and alternates for the trial takes up some seventy pages of the typewritten record. Their responses indicated that they were capable of making and disposed to make a fair and impartial evaluation of the evidence. Beyond that, counsel for the relator was sufficiently satisfied with the responses of these veniremen so that he used less than half of the peremptory challenges available to him. And he did not at any time ask for a change of venue. Compare the circumstances of this case with Irvin v. Dowd, 366 U. S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751; Rideau v. Louisiana, 373 U. S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663; Estes v. Texas, 381 U. S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543. While in a majority of this court these facts alone have not been considered sufficiently compelling to require the granting of a writ of habeas corpus in order to permit an independent showing that the trial was dominated by mob violence and hostile community attitudes, they certainly make the undertaking very difficult. To meet this difficult burden of proof relator

has relied largely upon the daily newspaper accounts and editorial comments published in the community during the trial of two of relator's alleged confederates, which ended only three days before he himself was required to stand trial. We have examined all of this material. The evidence does not indicate, as relator would infer, that the jurors who tried relator were waiting in or near the courtroom during the period of the trial of his confederates. At most it indicates that during the two weeks immediately preceding relator's trial the community in general had experienced a revival and quickening of interest in the homicide attended by many expressions of indignation against its perpetrators. But it does not appear that feeling ran so high or that hostility toward the relator was so intense and so general as to make it seem incredible that the search [fol. 1249] for a satisfactory jury would yield twelve persons as open minded about this case as the jurors here claimed to have been. The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions, yet not be convinced that failure to follow the wiser course was a denial of the essence of fair trial. The due process concept does not embrace all that a very careful and perceptive judge might do to protect a trial against emotional factors. It covers no more than the minimum protection which, consistent with our present ideas of justice, every court must afford. In this view of the reach of due process, we can not say that trial of relator at the time and place in question was a denial of constitutionally required protection.

Relator makes a second contention. Judge Hiram Keller presided over relator's trial. But another judge of the same court, Honorable Calvin Boyer, was much in and about the courtroom during the course of this trial. Judge Boyer had just completed a trial at which relator's confederates had been convicted of first degree murder without recommendation of mercy and, according to the press, he had commended the jury for its verdict. It is relator's contention that Judge Boyer's participation in and in-

fluence upon the trial were so unfair and prejudicial as to amount to a denial of due process of law. Here too the facts are now for the first time fully disclosed in the record. Relator's trial began June 7 and he was convicted June 14. There were daily morning and afternoon sessions. It now appears that every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session. At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury, although [fol. 1250] there is nothing to suggest that the jury could hear what was being said. It is also admitted that at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling. However, there is no claim that any erroneous or prejudicial ruling resulted from consultation between the presiding judge and his colleague. Finally, during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar and participants in the trial.

It seems to be agreed that the jurors knew who Judge Boyer was. The evidence makes it very probable that they also knew that he had just completed the trial at which relator's co-defendants had been convicted and sentenced to death. Moreover, it had been reported in the press that Judge Boyer had commended the jury for the first degree verdict against the co-defendants with its mandatory death penalty. Relator also makes the point that, while his trial was in progress, the press quoted statements of Judge Boyer in another case reasonably calculated to indicate that the jurist was engaged in an effort to make it clear that the community would deal very sternly with wrongdoers from Philadelphia, a category which included the relator. But this last incident could not have affected the jury in relator's case, because the jurors had no access to any source of news. Nevertheless, relator argues that the overall effect of this situation was to make Judge Boyer's impressive record of attendance at this trial an intolerably coercive influence upon the trial jury. But we think this is attaching too much significance to the jury's observation that a judge other than the trial judge was showing much

interest in the case. Certainly Judge Boyer was privileged to attend and observe proceedings of the court of which he was a judge. His presence in itself was not an impropriety. Even if the jurors identified him as an official who was hostile to the relator, we think it would be necessary to show that he had said or done something prejudicial to the de-
[fol. 1251] fendant during his stay in the courtroom before the fact of his presence and manifest interest could raise a substantial due process question.

The present petition charges one such act and this allegation has given us great concern. The relator alleged and attempted to prove that during the trial Judge Boyer actively helped the prosecutor. Specifically, there was testimony from witnesses who may well not have been unbiased that on one occasion Juge Boyer passed a written message to the prosecutor with the result that the prosecutor made a point to the presiding judge about an item in the charge. The government introduced evidence for the purpose of disproving this contention. The government's showing was less than overwhelming. Yet it was not unsubstantial. There was a sufficient conflict of testimony to make it necessary for the district court as the trier of facts in this habeas corpus proceeding to resolve the factual question whether Judge Boyer did or did not coach and advise the prosecutor as alleged. The district court made a specific finding that this alleged occurrence did not take place. On the record we think that we are not justified in disturbing that finding. And absent some such improper partisan participation by Judge Boyer in the trial, we cannot say that his rather striking manifestation of extraordinary interest in the proceedings constituted a denial of due process of law. It is established constitutional doctrine that our limited function in correcting fundamental impropriety in state trials challenged under the due process clause makes it necessary that we leave alone many dubious occurrences in state procedure which we would proscribe if they should happen in a federal court. With *Betts* v. *Brady*, 1942, 316 U.S. 455, contrast *Johnson* v. *Zerbst*, 1938, 304 U.S. 453.

No other point urged by relator warrants appellate interference with the decision of the district court or requires particular comment.

The judgment will be affirmed.

[fol. 1252] KALODNER, Circuit Judge, dissenting:

Under Pennsylvania law the jury fixes the penalty in first degree murder cases—imprisonment for life, or death.[1]

It is against the forefront of that grim and grave circumstance that Judge Boyer's conduct in the Darcy trial must be viewed, weighed and assessed and the issue determined whether Darcy was denied the due process guaranteed him by the Fourteenth Amendment. In doing so it must ever be kept in mind that "due process of law in the enforcement of a state's criminal law . . . expresses a demand for civilized standards of law" and "judicial review of that guaranty of the Fourteenth Amendment inescapably imposes . . . an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people *even toward those charged with the most heinous offenses*".[2] (emphasis supplied).

In my opinion the majority has failed to discern and assess the impact of Judge Boyer's conduct in the Darcy trial from the point of view, at the minimum, of the jury's role in determining Darcy's fate—life or death.

I am of the opinion, too, that the majority erred in another important respect—in treating Judge Boyer's conduct as an "occurrence", albeit "dubious", "in state procedure", immune as such, from federal judicial remedial action.

Let us first consider the issue of Judge Boyer's role in the Darcy trial.

Bucks County, where Darcy was tried, at the time had a population of approximately 144,000—75 per cent rural,

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[1] 18 P.S. § 4701. "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict."

[2] Concurring opinion of Mr. Justice Frankfurter in Malinski v. New York, 324 U.S. 401, 414, 416, 417 (1945).

25 per cent urban. Judge Boyer, then 72 years of age, was [fol. 1253] a native of Bucks County and had spent his entire life in the community. He had been a judge of the Bucks County Courts for some eighteen years. The extent to which he was known in the county is demonstrated by the fact that he had been its district attorney, twice by appointment and once by election; he had twice been elected for 10-year terms as judge (once in 1931 and again in 1941).

Judge Boyer had presided at the trial of Darcy's two confederates which terminated Friday, June 4th with a verdict of guilty and the imposition of death sentences by the jury. Judge Boyer had complimented the jury on its action, stating: "*I don't see how you could*, under the evidence, *have reached any other verdict.* Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. *The only hope of stemming the tide of such crime by youth is to impose the law which you have indicated by your decision.*" (emphasis supplied).[3]

Three days later, Darcy was placed on trial in the same court house in spite of the fact that he had previously been granted a "severance".[4] While I agree with the majority

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[3] Quotation is from a first page article in the "Doylestown Daily Intelligencer" on Saturday morning June 5th carrying an account of the jury's verdict the preceding day. It was captioned "Judge Boyer Praises Jury For Verdict Condemning 2 Killers To Electric Chair". (Relator's Exhibit No. 78).

[4] Under Pennsylvania law "severances" are granted as a matter of absolute right when applied for by a defendant in a murder case. They are designed to grant the defendant a "separate" trial. It is interesting to note that the majority in noting that Darcy had been placed on trial only three days after conclusion of the trial of his confederates had this to say:

> "The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed

that this circumstance, standing alone, did not constitute denial of due process, it merits most serious consideration in evaluating the impact of Judge Boyer's conduct in the [fol. 1254] Darey trial since the trial of the confederates had been widely reported not only in the local newspapers and via radio but in nearby Philadelphia newspapers which had a considerable circulation in Bucks County.[3]

President Judge Hiram H. Keller of the Bucks County Court presided at Darey's trial. He had, at the time, served some eighteen years as president judge.

It may be well at this point to advert to the factual findings which the majority made on the score of Judge Boyer's presence in the courtroom during Darey's trial:

> "*Honorable Calvin Boyer was much in and about the courtroom during the course of this trial . . .*
>
> "*. . . every day of this trial Judge Boyer spent, some time, on occasions several hours, in the courtroom. He even attended an evening session.*
>
> "*At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury,* although there is nothing to suggest that the jury could hear what was being said.
>
> "*. . . at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling.*
>
> "*. . . during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar . . .*

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important. We may be persuaded that in the circumstances it would have been wise to take such precautions, yet not be convinced that failure to follow the wiser course was a denial of the essence of a fair trial. The due process concept does not embrace all that a very careful and perceptive judge might do to protect a trial against emotional factors."

[3] I imply no criticism of the newspaper, radio or television coverage of the trial of Darey's confederates or his own, or of the events which preceded them.

"*. . . the jurors knew who Judge Boyer was. The evidence also makes it very probable that they also knew that he had just completed the trial at which relator's (Darcy's) codefendants had been convicted and sentenced to death. Moreover it had been reported in the press that Judge Boyer had commended the jury for the first degree verdict against the codefendants with its mandatory death penalty.*"

[fol. 1255] There was a "*rather striking manifestation of extraordinary interest in the* (trial) *proceedings*" by Judge Boyer.

It had come "*to the jury's observation that a judge* (Judge Boyer) *other than the trial judge was showing much interest in the case.*" (emphasis supplied).

Despite these significant and critical findings the majority concluded that Judge Boyer's presence and conduct in the Darcy trial fell short of the fundamental unfairness proscribed by the due process guarantee.

It went so far as to declare that "*Even if the jurors identified him* (Judge Boyer) *as an official who was hostile to the relator* (Darcy) that would not be enough: . . . it would be necessary to show that he (Judge Boyer) *had said or done something* prejudicial to the defendant during his stay in the courtroom *before the fact of his presence and manifest interest* could raise a substantial due process question."

I disagree with the majority's conclusion.

I believe that if the jurors identified Judge Boyer "as an official who was hostile" to Darcy such identification in and of itself raised a due process question which must be resolved in favor of Darcy, because a "hostile" attitude of a judge can, and almost universally does, effectively influence and guide a jury's verdict.

My opinion is based on intensive observation of juries during the ten years which I spent as presiding judge in the trial of criminal cases before I came to the appellate bench.

I know from first-hand experience how the members of a jury, consciously or subconsciously, are ever on the alert to glean from what a judge has said or done during the

course of a trial his opinion as to the guilt or innocence of a defendant. Jurors look, figuratively speaking, to every spoken word, to every nuance and inflection, to every gesture, no matter how slight or unintentional, to the extent [fol. 1256] and tenor of judicial participation in examination or cross-examination, to anything which could conceivably be construed as a straw in the wind as to the judicial "attitude".

The United States Supreme Court, the Supreme Court of Pennsylvania, and other appellate courts, have time and again emphasized the existence of this significant judge-jury relationship.

"It is obvious that under any system of jury trials *the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.*" Starr v. United States, 153 U.S. 614, 626 (1894); Quercia v. United States, 289 U.S. 466, 470 (1933).[6] (emphasis supplied).

The Supreme Court of Pennsylvania has similarly appraised the judge-jury relationship, stating, in the leading case of Commonwealth v. Myma, 278 Pa. 505, 508 (1924): "The practice of a judge entering into the trial of a case as an advocate is emphatically disapproved. The *judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exceptions, looks for guidance*, and from whom the litigants expect absolute impartiality. *An expression indicative of favor or condemnation is quickly reflected in the jury box and at the counsel table.* To depart from the clear line of duty through questions, expressions or conduct, contravenes the orderly administration of justice. *It has a tendency to take from one of the parties the right to a fair and impartial trial, as guaranteed under our system of jurisprudence.*" To the same effect see Commonwealth v. Trunk, 311 Pa. 555, 566 (1933); Scrrentina v. Graziano, 341 Pa. 113, 119 (1941); Schlessinger Petition, 367 Pa. 476 (1951); Commonwealth

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[6] We applied the principle stated in United States v. Link, 202 F.2d 592, 595 (1953).

v. Claiborne, 175 Pa. Sup. Ct. 42, 50 (1953)[7] (emphasis [fol. 1257] Evidencing its insistence upon strict conformity with these expressed standards governing judicial office, the Supreme Court of Pennsylvania has held that their breach constitutes a deprivation of "due process".

It did so in DiBona, Adm'r. v. Philadelphia Transportation Company, 356 Pa. 204, 216 (1947), stating: "Judges should never forget that 'the first and most essential element in a jury trial is a wise, learned, impartial and competent judge'. See Martin et al. v. Phila. Gardens, Inc. 348 Pa. 232, 236 . . . and Com. v. Brown, 309 Pa. 515, 521 . . . *A litigant who is denied this 'essential element' is deprived of 'due process of law'.*" (emphasis supplied).

It may be said that the foregoing is inapposite in the instant case because Judge Boyer was not the "presiding judge" at Darcy's trial. On that score it need only be pointed out, as the majority found, that Judge Boyer time and again "sat" on the bench with Judge Keller during the course of the trial and that he "at times . . . joined Judge Keller on the bench for whispered consultations within view of the jury" and further, "at least one such consultation was designed for the *guidance of Judge Keller in the making of a trial ruling.*" (emphasis supplied).

Coming now to the majority's statement that in the absence of proof that "Judge Boyer had said or done something prejudicial during his stay in the courtroom", there could be no finding of denial of due process:

In my opinion the record more than amply demonstrates that Judge Boyer "had done something prejudicial" to

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[7] The United States Court of Appeals for the Second Circuit in United States v. Brandt, 196 F.2d 653, 656 (1952) expressed a similar view with reference to the judge-jury relationship, stating: "*Because of his proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury or laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence.*" (emphasis supplied).

Darcy. The majority's own finding of his "rather striking manifestation of extraordinary interest in the proceedings" and its implicit recognition of the jury's identification of Judge Boyer as "hostile" establish that Judge Boyer "had done something prejudicial".

[fol. 1258] If more is needed the record supplies it.

The jury "knew" who Judge Boyer was. They "knew" he had presided at the trial of Darcy's confederates and they knew that he had praised the jury for finding them guilty and sentencing them to death.[8] They "knew" Judge Boyer "was showing much interest in the case". They "knew" the extent of his "interest from the fact that he was in daily attendance at the trial and that "he even attended an evening session". They "knew" it from the fact of his "whispered consultations" with Judge Keller and they "knew" it from the fact that he sat, hours at a time, in a specially-placed chair on the front row, directly facing the jury and within its view.

Sitting there in that chair, staring the jury in the eye, as it were, Judge Boyer was to it an uncompromising watchful omnipresence: a stern sentinel of justice; an "overseer judge" over the jury itself, dedicated to the meting out of the fullest measure of penalty to the defendant; a silent but eloquent extra-judicial aid to the prosecuting attorney.

I cannot conceive of a more striking example of judicial "guiding" of a jury's verdict—I refer particularly to the jury's imposition of the death sentence—than was so glaringly apparent in the instant case. It falls squarely within the reach of the prevailing rule proscribing undue judicial influence on a jury, and constituted fundamental unfairness violative of the due process clause. DiBona, Adm'r. v. Philadelphia Transportation Company, supra.

The duty of this court to give consideration to the "*totality of facts* in a given case" where the due process clause is invoked, was clearly spelled out by the Supreme Court of the United States in Betts v. Brady, 316 U.S. 455 (1942). (emphasis supplied).

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[8] The voir dire examination of the jurors in the Darcy case disclosed that 89 percent of them had read the newspaper accounts of the trial of Darcy's confederates.

"The phrase (due process) formulates a concept less rigid and more fluid than [those envisaged in other specific and particular provisions of the Bill of Rights] [Fol. 1259] Its application is [not] a matter of rule. A asserted denial *is to be tested* [by an examination of the] *totality of facts in a given case.* [See p. 553]

"As we have said, the F[ourteenth Amendment] prohibits the conviction and i[mprisonment] of one where trial is *offensive to the com[mon sense and fundamental ideas] of fairness and right* . . ." [See p. 553] (emphasis supplied)

Again, in Johnson v. Zerbst, [304 U.S. 458 (1938),] The Supreme Court said (pp. 465-66):

"True, *habeas corpus* cam[not be used as a means of] reviewing errors of law and [irregularities—not involving the question of jurisdic[tion—occurring during the course of trial; and the 'wr[it of habeas corpus cannot] be used as a writ of erro[r]. [These principles, however,] *ever, must be construed and [applied so as to be effective] —not destroy—constitutional safeguards of human life and liberty.* The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment." (emphasis supplied) [9]

I come now to the alleged note-passing incident which the majority indicated it would have considered "such improper partisan participation by Judge Boyer in the trial" as to come within the reach of the due process clause had it been established by the evidence.

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[9] "As applied to a criminal trial *denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.* In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." Lisenba v. California, 314 U.S. 219, 236 (1941) (emphasis supplied).

I have deferred discussion of this phase of the case because of my view that independent of the note passing incident the record sufficiently disclosed that Judge Boyer had "done something" prejudicial in violation of the due process guarantee.

[illegible]

I disagree with the majority.

Three witnesses for Darcy testified that *during* Judge Keller's charge Judge Boyer sat in his "special chair" with the district attorney seated nearby; that Judge Boyer passed a note to the district attorney and the latter thereupon arose and addressed Judge Keller with respect to a point in his charge.

The district attorney [11] and his assistant [illegible] testified that

[11] Testimony of District Attorney Hunter, N. T. pp. 88-89:

"Q. Do you recall—strike that. During the charge of the Court will you tell us, please, what you recall of the charge as far as your location in the courtroom is concerned?

"A. My best recollection is that when the charge began, or very early in the charge, Mr. Curtin and I retired to the seats which are in front of the table nearest to the right of the sitting Court.

"Q. Is that the table which has been identified by some persons as being a press table?

"A. I heard Mr. Curtin refer to it in language that might be assumed to be a press table. That is the table I am referring to.

* * * * * * *

"Q. And were you seated there with any other person?

"A. Mr. Curtin was there with me. I, of course, don't recall whether we were there for every moment of the charge.

[FOOTNOTE 11 ON PAGE 1260]

during the course of Judge Keller's charge they did not sit [fol. 1261] at their customary places at the Commonwealth's counsel table which was about four feet or so from the jury, but instead sat at the press table some 15 feet distant (on the opposite side of the room); the chairs in which they sat

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but my recollection is that we were there for a major part of the charge.

* * * * * * *

"Q. Do you have any recollection of Judge Boyer being present in the courtroom during any portion of the charge?

"A. I have not.

* * * * * * *

"Q. There has been testimony to the effect that during the charge a note was written and passed by Judge Boyer to you. Now, do you have any recollection of any such incident?

"A. No recollection whatsoever."

"Testimony of Assistant District Attorney Curtin—N. T. pp. 713-14-15, 21:

"Q. How far was the Commonwealth's table from the nearest juror?

"A. The front of the Commonwealth's table would be about four to five feet from the front of the nearest juror—the front of the chair of the nearest juror.

"Q. And how far was it from the Commonwealth's table to the strike that. Was there a table to the rear of the Commonwealth's table?

"A. There was.

"Q. And what was the purpose of that table?

"A. That was a table where the reporters constantly sat and where they were seated during this trial when they were there.

* * * * * * *

"Q. Can you give us any estimate of the distance between the Commonwealth's table and the table which, I believe, you have referred to as being used by members of the press?

"A. I would say there was at least fifteen feet separating those two tables.

* * * * * * *

at the press table were some eight feet or so away from the "special chair" reserved for Judge Boyer's use; they had "no recollection" whether Judge Boyer was at the time seated in his chair; they had "no recollection" whether Judge Boyer had passed a note to the district attorney as testified to by the relator's witnesses.

"Q. Now, Mr. Curtin, do you recall where Mr. Biester was seated during the charge of the Court?

"A. To the best of my recollection, sir, both Mr. Biester and I were seated in two of the chairs in the first of the two rows of chairs which were immediately in front of the reporters table.

* * * * * * *

"Q. Do you recall whether there was anyone sitting at the Commonwealth's table during the charge of the Court?

"A. I believe that I went to it for a few minutes but, to the best of my recollection, the Commonwealth's table had no one seated at it during most of Judge Keller's charge.

"Q. Do you recall seeing Judge Boyer in the courtroom during the Court's charge?

"A. I have no recollection whatsoever of Judge Boyer being in the courtroom during the charge of Judge Keller.

"Q. Do you have any recollection of any note having been handed by Judge Boyer—to Mr. Biester at any time during the charge of the Court?

"A. I have absolutely no recollection of any note being handed to Judge—to District Attorney Biester at any time during the charge of the Court?

* * * * * * *

"Q. Now what you call the reporters table, is that the one that is between your table and the body of the courtroom?

"A. No, you are pointing to the defendant's table there.

"Q. Defendant's table, all right. Then the reporters table was here—you said some distance—I think you said about eight feet from the chair marked 'Judge Boyer'?

"A. About eight feet from the front of the chair marked 'Judge Boyer' to the back of the chair behind the reporters table; eight or ten feet."

[fol. 1262] The district attorney also testified that he had "no recollection" as to whether Judge Boyer had "assisted him" in the Darcy trial.[12]

It was on the basis of this "no recollection" testimony that the District Court Judge made the factual finding that the note-passing incident had *not* occurred and that Judge Boyer had not at any time assisted the district attorney.

In my opinion, in a case where a man's very life is at stake, *non-negating* testimony such as was given by the district attorney and his assistant cannot be regarded as affording "substantial" basis for a fact-finding such as was made by the District Court in the instant case.[13]

One cannot simply shrug off with a "no recollection" statement affirmative testimony of such an extraordinary event as the passing of a note by a judge to a prosecuting attorney in a murder trial.

Note-passing by a judge, to a district attorney, can scarcely be regarded as a casual, routine, every-day, run-of-the-mine occurrence. The implication of such an occurrence could scarcely escape an experienced prosecuting attorney and the event would have been indelibly inscribed upon his memory. But curiously here the district attorney had "no recollection" as to whether *it had happened or had not happened*. And even more curiously, lightning seems to have struck twice, because the assistant district attorney who was admittedly sitting by his side also has

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[12] N. T. p. 896:

"Q. At any time during the Darcy trial did Judge Boyer assist you in any way in the presentation of the evidence in the trial of the case?

"A. I have no recollection of such a situation at all, Mr. Van Artsdalen."

[13] The testimony disclosed that it was Zeitz, one of Darcy's confederates who had killed the deceased by one of two bullets which he fired in the course of their "get-away" from the scene of the hold-up; that Darcy had not fired his gun at the time. Darcy then was 22 years old. These facts, it is urged, might have been taken into consideration by the jury—at least to the extent of imposing a life sentence—had it not been "coerced" by Judge Boyer.

"no recollection" whether *it had happened or had not happened.*

[fol. 1263] It seems to me that the thread of a man's life, no matter how "heinous" his crime, should not be snapped asunder by the erratic, dulled blade of "no recollection".

My resolution in this respect is reinforced by the admitted but unexplained circumstance that the district attorney and his assistant, when the trial judge began his charge to the jury, saw fit to leave their customary places at the Commonwealth table, close to the bench and only four feet from the jury, and to seat themselves some 15 feet away at the press table, which, as they said, was some eight feet from "Judge Boyer's chair".

In conclusion I will dwell but briefly with the majority's view that Judge Boyer's conduct was an "occurrence—in state procedure", immune, as such, from the reach of the due process guarantee. Implicit in the majority's discussion on this score [14] is its recognition that Judge Boyer's conduct was "dubious" and its indication that it would have "proscribed" it had it happened in a trial in a federal court and would have considered it as a compelling basis for granting a new trial.

Shaken down to its hard core the majority's position—bluntly stated—is this: Darcy was grievously hurt by Judge Boyer's conduct but we cannot help him because he was hurt on the other (the State) side of the street; otherwise stated, there is no constitutional redress for Darcy despite the fact that he was unfairly tried because it was his fate to be tried in a State court instead of a Federal court.

I do not agree.

I cannot draw as fine a line as the majority has drawn when the terminus of that line is death.

The mere circumstance that what happened to Darcy

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[14] "It is established constitutional doctrine that our limited function in correcting fundamental impropriety in state trials challenged under the due process clause makes it necessary that we leave alone many dubious occurrences in state procedure which we would proscribe if they should happen in a federal court."

occurred in a State and not in a Federal court cannot operate to deprive him of his constitutional rights.

[fol. 1264] Judge Boyer's extraordinary and unprecedented conduct was totally foreign in every respect to the normal procedural course of a criminal trial in the Pennsylvania courts. It was not in any sense within the periphery of what may be described as the customary and normal procedure in Pennsylvania criminal trials. Its significance in its compelling impact upon the jury was of such proportion and vitality as to take it out of the category of "state procedure".

It is not incidental to any accepted standard of state procedure for a judge to conduct himself as Judge Boyer did in the Darcy trial. It is not incidental in Pennsylvania for a judge who has just completed a trial of a defendant's confederates and praised the jury which found them guilty and fixed death as their penalty, to participate, as Judge Boyer did, in the trial of a third confederate, presided over by the president judge of this court. It is not incidental for a judge to have a "special chair" placed for his use on the front row of the courtroom where he is in full view of the jury and it is within his full view and for him to sit there as an extra-curricular judicial overseer.

And it is not incidental in Pennsylvania criminal trials for a judge "to pass a note" to the district attorney.

In my opinion it can fairly be said of Judge Boyer's conduct that "This is conduct that shocks the conscience" in violation of the due process guarantee.[15]

Its inevitable effect was to distort the trial process to the extent at least that Darcy was deprived of a possible unprejudiced jury determination that justice required only the imposition of a life sentence instead of death.[16]

Of Judge Boyer's conduct it can also be said, as the Supreme Court of the United States said in Chambers v. Florida, 309 U. S. 227 (1940):

> ". . . no man's life, liberty or property (can) be forfeited as criminal punishment . . . until there has [fol. 1265] been a charge fairly made and *fairly tried* in

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[15] Rochin v. California, 342 U. S. 165, 172 (1952).

[16] See Note 13.

a public tribunal *free of prejudice, passion, excitement and tyrannical power*". (pp. 236-37)

* * * * * * *

"Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." (p. 241) (emphasis supplied).

Upon consideration of the "totality of facts", evidenced by the Darey trial record, as directed by the Supreme Court of the United States in Betts v. Brady, supra, and applying the rule there stated that ". . . the Fourteenth Amendment prohibits the conviction . . . of one whose trial is offensive to the common and fundamental ideas of fairness and right",[17] I am of the opinion that the judgment of the District Court should be reversed and the prayer of the relator granted.

McLaughlin, Circuit Judge, authorizes me to state that he concurs with the views expressed in the foregoing dissent.

BIGGS, Chief Judge, dissenting:

On reviewing the record in this case I cannot avoid an abiding conviction that the judicial process under which

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[17] In Buchalter v. New York, 319 U. S. 427, 429 (1943) the late Mr. Justice Roberts stated the applicable rule as follows:

"The due process clause of the Fourteenth Amendment requires that action by a state . . . must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'."

To the same effect see Rochin v. California, 342 U. S. 165, 169 (1952) wherein it was stated:

"Due process is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', Snyder v. Mass., 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty', Palko v. Conn. 302 U. S. 319, 325 . . ."

Darcy was tried was so distorted by circumstances, both in and out of the courtroom, as to result in fundamental unfairness. The brutal crime committed by Darcy, Foster, Zeitz and Capone had angered the citizens of Bucks County. [fol. 1266] By editorials, news stories and comments the press prejudged Darcy's case and prejudiced the minds of the citizenry against him. I cannot believe that all members of the jury remained uninfluenced by these publications.

Though Darcy had been granted a separate trial pursuant to the Pennsylvania Act of March 31, 1860, 19 P. S. Pa. § 75, the severance was rendered worthless when his trial was proceeded with only three days after that of Foster and Zeitz. Under the circumstances a change of venue or a delay in putting Darcy on trial was requisite to fairness.

Judge Boyer's preoccupation with Darcy's trial was intense. He had been on the bench for many years and was a man of great weight in the community. He had complimented the jury at the close of the trial of Foster and Zeitz for imposing the death penalty and this fact had been widely publicized immediately preceding the commencement of Darcy's trial. From his repeated visits to and his behavior in the courtroom the members of the Darcy jury, with reason, could have inferred that he desired to indicate his belief and his desire that Darcy, like Foster and Zeitz, should be found guilty and that the penalty of death should be imposed upon him by the jury: that such was the belief and the desire of the judicial authorities of Bucks County. Though in theory a judge does not control the decisions of juries, judicial attitudes have great influence on jurors. Fairness cannot condone Judge Boyer's conduct.

The foregoing amounts to a denial of due process. A writ of habeas corpus should issue in this case and Darcy should be granted a new trial. The grant of the writ will not prevent him from being tried again for he cannot successfully plead double jeopardy.

[fol. 1267] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,564

UNITED STATES OF AMERICA, ex rel. DAVID DARCY, Appellant,

vs.

EARL D. HANDY, Warden of Bucks County Prison; DR. FRED S. BALDI, Warden of Western State Penitentiary, Rockview; and Carl N. Fleckenstine, United States Marshal for the Middle District of Pennsylvania

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: Biggs, Chief Judge, and Marris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

JUDGMENT—June 9, 1955

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest: Ida O. Creskoff, Clerk.

June 9, 1955.

[File endorsement omitted.]

[fols. 1268-1291] Petition for rehearing covering 24 pages filed June 23, 1955, omitted from this print. It was denied and nothing more by order, July 11, 1955.

[fols. 1292-1294] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed July 11, 1955

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

BIGGS, Chief Judge, and McLAUGHLIN and KALODNER, Circuit Judges, dissent.

By the Court William H. Hastie.

Dated: July 11, 1955.

[File endorsement omitted.]

[fol. 1295] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—Filed July 15, 1955

After due consideration of the appellant's motion for stay of mandate in the above-entitled case,

It is ordered that issuance of the mandate in the above-entitled cause be and it is hereby stayed until August 15, 1955.

By the Court, William H. Hastie, Circuit Judge.

Dated: July 15, 1955.

[File endorsement omitted.]

[fol. 1296] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 1297] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955.

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 24, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5942-8)

SUPREME COURT, U. S.

Office Supreme Court, U. S.
AUG 5 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955.

No. 323

UNITED STATES OF AMERICA, ex rel., DAVID DARCY,
Petitioner,

vs.

EARL D. HANDY, Warden of Bucks County Prison, DR. FRED S. BALDI, Warden of the Western State Penitentiary, and CARL H. FLECKENSTINE, United States Marshal for the Middle District of Pennsylvania,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1955.

No.

UNITED STATES OF AMERICA, ex rel. DAVID DARCY,
Petitioner,

vs.

EARL D. HANDY, Warden of Bucks County Prison, DR. FRED S. BALDI, Warden of the Western State Penitentiary, and CARL H. FLECKENSTINE, United States Marshal for the Middle District of Pennsylvania,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, David Darcy, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this

case on June 9, 1955, affirming a judgment of the United States District Court for the Middle District of Pennsylvania, dismissing a petition for writ of habeas corpus.

1.

OPINIONS BELOW.

The opinion of the District Court dismissing the petition for writ of habeas corpus without permitting relator to introduce evidence in support of his contentions is reported in 97 F. Supp. 930.

The opinion of the United States Court of Appeals for the Third Circuit, remanding the case to the District Court for a full hearing on the issues of the alleged atmosphere of hysteria and prejudice prevailing at the relator's trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, is reported in 203 F. 2d 407.

The opinion of the District Court, after a hearing relating to the circumstances under which the relator was tried in Bucks County, Pennsylvania for felonious homicide in the commission of an armed robbery, is reported in 130 F. Supp. 270.

The opinion of the United States Court of Appeals for the Third Circuit, affirming in a divided (4-3) decision, the opinion rendered by Hastie, Circuit Judge, as well as the decision of the District Court is not reported. The majority dissenting opinion, rendered by Kalodner, Circuit Judge, concurred in by McLaughlin, Circuit Judge, and another separate dissenting opinion rendered by Biggs, Chief Judge, entered on June 9, 1955 is appended to this petition (pp. 78-102).

The divided 4-3 order of the Court of Appeals denying a petition for rehearing is not reported.

STATEMENT OF JURISDICTION.

1. The jurisdiction of this Court is invoked under Title 28, U. S. Code, Annotated, Section 1254 (1), as well as under Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

2. Petitioner was convicted of murder in the first degree, with penalty fixed at death, in the Court of Oyer and Terminer of Bucks County, Pennsylvania, after a jury trial, on June 14, 1948.

3. The judgment of the Court of Appeals sought to be reviewed was entered on June 9, 1955. A petition for rehearing of said judgment was denied by the Court below on July 11, 1955.

4. On July 15, 1955, the Court below entered an order staying the mandate in this case until August 15, 1955 to permit petitioner to make application to this Court for writ of certiorari.

3.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTES.

The Revised Judicial Code, 28 U. S. C. A. Section 2241.

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless ——

* * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * *"

PENNSYLVANIA STATUTES.

The Act of June 24, 1939, P. L. 872, Section 701, 18 Purdon's Penna. Statutes Annotated, Section 4701:

> "* * * Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict * * *."

The Act of March 31, 1860, P. L. 427, Section 40, 19 Purdon's Penna. Statutes Annotated, Section 785:

> "* * * In all cases in which two or more persons are jointly indicted for any offense, it shall be in the discretion of the court to try them jointly or severally, except that in cases of felonious homicide, the parties charged shall have the right to demand separate trials * * *."

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals err in holding that petitioner in a habeas corpus proceeding, under sentence of death for murder, who claimed that he had been denied a fair trial in a state capital case because of the atmosphere of hysteria

and prejudice prevailing at his trial and because of the interest, attendance and participation of an "overseer judge" in his case, had not been denied due process of law under the Fourteenth Amendment merely because there was no proof that the physical presence of a mob or a threat of mob violence dominated his trial, but where, however, there was the following proof of a more subtle, yet even more effective, type of domination of his trial by prejudice and hysteria; that, immediately following a hold-up murder in a small rural county, there was expressed public sentiment and prejudice against the four youths involved; that local newspapers carried inflammatory and prejudicial front-page reports of the crime of the "trigger-happy bandits" from Philadelphia and of their confession of this and other hold-ups, in four of which the petitioner was erroneously included as a participant; that newspaper editorials criticized leniency of juries in not imposing death penalties and condoned "mob law"; that, prior to the trial of his companions, public sentiment throughout the county was vociferous in condemning the bandits and in demanding the death penalties; that, daily during the two weeks of his companions' trial, the newspapers carried inflammatory front-page reports of the trial and of petitioner's role in this and other hold-ups, although in four thereof he was not involved; that local radio stations broadcasted news of that trial; that petitioner had originally been granted a separate trial, scheduled for the term of court following the trial of his companions; that, suddenly, at the end of the first trial, petitioner's trial was scheduled to start immediately after his companions' trial; that the jury panel, from which his jury was selected, appeared in court during the first trial and had the opportunity to listen thereto; that petitioner's trial started three days after the first cases ended, while the newspaper and radio publicity were still fresh; that the voir dire examination of the petitioner's jury showed a marked

increased fixity of opinion of prejudging of and prejudice against him; and that, during his trial, the trial judge in his companions' case, whom the jury "knew" as being hostile to petitioner and who had publicly voiced his indignation against these "outlanders," showed such an extraordinary interest in the proceedings by his excessive attendance and active participation thereat as to guide and influence the jury's verdict and imposition of the death sentence?

2. Did the Court of Appeals err in holding that the "extraordinarily unprecedented conduct" of a judge, other than the trial judge in the petitioner's case, was not so unfair and prejudicial as to amount to a denial of due process of law, where there was proof that said "overseer judge" had presided at the trial of petitioner's companions; that he had publicly praised that jury for having imposed the death penalties; that he was present every day and even attended an evening session during the petitioner's trial either on the bench with the trial judge or at a prominent position facing the jury as a spectator in the court room; that at times he joined the trial judge on the bench "for whispered consultations" within view of the jury; that during one such consultation he, rather than the trial judge, actually made a ruling on a vital evidentiary issue; that during the charge to the jury he actively helped the prosecutor; that he was identified by the jurors as "an official who was hostile" to petitioner; and that such "rather striking manifestation of extraordinary interest" and participation effectively guided and influenced the jury's verdict, fixing the penalty at death rather than at life imprisonment?

REASONS FOR ALLOWANCE OF WRIT.

1. Each of the questions presented herein embodies an important question of federal law which has not been, but should be, settled by this Court.

2. All seven (7) of the judges in the court below were of the opinion as stated by the majority that: "The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wiser to take such precautions * * *." Four (4) judges were "not (be) convinced that failure to follow the *wiser course* was a denial of the essence of fair trial." Three (3) judges were convinced that such failure to change venue or to continue the trial constituted a denial of due process. Such decided difference of opinion presents an important question of federal law which has not been, but should be, settled by this Court.

3. All seven (7) of the judges in the court below recognized that Judge Boyer's "rather striking manifestation of extraordinary interest in the proceedings" constituted a "dubious occurrence" in state procedure. Four (4) judges believed that they should "leave alone * * * (such) dubious occurrences in state procedure which we would proscribe if they should happen in a federal court." Three (3) judges were convinced that such "dubious occurrence" constituted a fundamental impropriety in a state trial which should be

corrected by a federal court under the due process clause. Such decided difference of opinion presents an important question of federal law which has not been, but should be, settled by this Court.

4. The decision herein recognizes that there were many "dubious occurrences" in petitioner's trial which would have been proscribed if they had happened in a federal court, but which must be left alone because they occurred in a state court. Such rationale overlooks and ignores the basic test of determining whether or not there has been a denial of due process of law in the enforcement of a state's criminal law—namely, whether the proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses." Certainly, the proceedings in petitioner's trial—in and out of the court room, both before and during the trial—establish that he did not receive a fair trial. The conduct of the trial was, indeed, such that "shocks the conscience."

5. The decision herein, holding that the petitioner in a habeas corpus case has not been denied due process of the law merely because there was no proof that the physical presence of a mob or a threat of mob violence had dominated his trial on a capital charge in a state court, departs from the accepted and usual course of judicial proceedings, in that such decision incorrectly applies the principles of *Johnson v. Zerbst*, 304 U. S. 458 (1938) and *Betts v. Brady*, 316 U. S. 455 (1942) by narrowing—instead of broadening—the scope of inquiry in habeas corpus proceedings under the Fourteenth Amendment, especially since there was in this case proof of a more subtle and even more direct type of trial domination—(a) that the local newspapers, by their inflammatory and prejudicial articles and editorials, car-

ried on a campaign to secure the death penalty for petitioner, irrespective of the evidence and extenuating circumstances, (b) that such newspaper campaign influenced and guided public opinion to such a degree that by the date of the petitioner's trial the death penalty eventually imposed had already been prejudged, (c) that the petitioner's trial, originally scheduled to start at the term of court following the trial of his companions, was suddenly rescheduled to start immediately thereafter when it was apparent that death penalties would be imposed in that trial, (d) that the jury panel selected to try petitioner had been present in the court house during the trial of his companions, (e) that 89% of the jurors asked the question had answered that they had read the newspaper accounts of the prior trial, 50% of those asked answered that they had discussed the case, and 30% of those asked answered that they had fixed opinions about the case, and (f) that petitioner was tried by a "two-judge" bench, consisting of the trial judge and the judge who had just three days before completed presiding in the trial of his companions, and had publicly praised the jury's fixing their penalty at death as the only possible penalty, who acted as an "overseer judge" and also as an aid to the prosecutor in petitioner's trial, who was known by the jurors to be "hostile" to petitioner, and whose attendance and active participation influenced and guided the jury's imposition of the death penalty.

6. The decision herein holding that such "overseer judge"'s "extraordinary and unprecedented conduct" and "rather striking manifestation of extraordinary interest in the proceedings" did not deny petitioner of a possible unprejudiced jury determination of the penalty to be imposed—whether death or life imprisonment—and did not deny him the due process guaranteed by the Fourteenth Amendment departs from the usual and accepted course of judicial proceedings

and, also, overlooks the fact that such conduct is "offensive to the common and fundamental ideas of fairness and right."

7. The decision herein is at variance and in conflict with the decision of this Court in *Moore v. Dempsey*, 261 U. S. 86 (1923), as broadened by *Shepherd v. Florida*, 341 U. S. 50 (1951), that defendant should not be compelled to undergo a trial dominated by passion and prejudice.

8. The decision herein appears to be in conflict with other applicable decisions of this Court.

STATEMENT OF THE CASE.

I.

History.

Darcy, the petitioner, then 22 years old, and three companions, Foster, 23, Zeitz, 18, and Capone, 16, engaged on December 22, 1947 in the armed robbery of the Feasterville Tavern near Doylestown, Bucks County, Pennsylvania. While the four youths were fleeing in an automobile from the scene of the robbery, a bystander, Kelly, was shot and killed by Zeitz.

As a result of this homicide, the petitioner and his three companions were jointly indicted in the Court of Oyer and Terminer of Bucks County, Pennsylvania, at No. 37, February Sessions, 1948 for the murder of Kelly, growing out of armed robbery.

Petitioner requested and was granted severance. Capone pleaded guilty.

Foster and Zeitz, two of petitioner's companions in the robbery, were tried first on this charge, before a jury presided over by Judge Calvin S. Boyer. The trial started on Monday, May 24, 1948 and ended on Friday, June 4, 1948. The jury returned a verdict of first degree murder and, in the exercise of their discretion as authorized by Section 701 of the Penal Code of 1939 (18 Purdon's Penna. Statutes Annotated, Section 4701) fixed the penalty of death. The judgments and sentences were affirmed, and opinions are reported at 364 Pa. 288, 72 A. 2d 279 and 364 Pa. 294, 72 A. 2d 282.

The petitioner was placed on trial in the same court, before President Judge Hiram H. Keller and a jury on Monday, June 7, 1948—just three days after the convictions and sentences of Foster and Zeitz.

Petitioner's trial took place in a hostile and prejudicial atmosphere just 3 days after the conviction of the co-defendants of murder in the first degree with penalty fixed at death, and after widespread publicity had been given to the case almost continuously from the day of the crime and particularly during the two weeks' trial of said co-defendants and, also, after public prejudice had become intensified against the defendants and after widespread publicity had been given to Judge Boyer's praise of the jury and the death penalties in the Foster-Zeitz trial. On June 14, 1948, the petitioner was found guilty of murder in the first degree and in his case, also, the jury fixed the penalty at death.

A history of the proceedings subsequent to petitioner's conviction and sentence is as follows: A petition for a new trial was filed and was denied by the trial court, Darcy's conviction and sentence being affirmed. An appeal was taken to the Supreme Court of Pennsylvania and the judgment of the court below was affirmed, Mr. Justice Jones dissenting. See *Commonwealth vs. Darcy*, 362 Pa. 259, 66 A. 2d 663. Application for certiorari to the Supreme Court

of the United States was denied. See 338 U. S. 862. Darcy next filed a petition for habeas corpus to the Supreme Court of Pennsylvania, being the first such petition filed to that court. It was denied without opinion. An application for certiorari to the Supreme Court of the United States was denied. See 338 U. S. 862.

Darcy then applied to the Supreme Court of Pennsylvania for certiorari to the Court of Oyer and Terminer of Bucks County, Pennsylvania and for reargument nunc pro tunc. In this application, petitioner raised the same questions as those set forth in his instant petition, save one, viz., that Darcy's counsel would not permit him to take the stand. The application was denied by the Supreme Court of Pennsylvania without opinion. No application for certiorari to this Court was made from this denial. On April 3, 1951, the same day on which Darcy's petition to the Pennsylvania Supreme Court for certiorari and for reargument nunc pro tunc was denied by said court, Darcy filed his petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania. Insofar as applicable to the instant appeal[1] the petition alleged that he was in custody in violation of the Fourteenth Amendment of the United States Constitution (28 U. S. C. A. 2241) because: (1) the relator was tried in an atmosphere of hysteria and prejudice, since the newspapers in Bucks County by their detailed and inflammatory front-page accounts of the crime and of the Foster-Zeitz trial and by their editorial policy literally demanding the death chair for the relator and his companions had rendered impossible the impaneling of a fair and impartial jury in the Darcy trial, Darcy having been put to his

[1] The petition also alleged that Darcy was deprived of the rights guaranteed to him by the Fourteenth Amendment by reason of the lack of effective assistance of counsel. The Court, in its Per Curiam Opinion, **203 F. 2d 407**, sustained the action of the District Court in denying the petition for habeas corpus based on this allegation.

trial almost immediately—3 days—after that of Foster and Zeitz, who had been found guilty of first degree murder, with death penalty; and (2) that Judge Calvin S. Boyer, the judge at the earlier Foster-Zeitz trial, who had already demonstrated prejudice against all the robbers and who had publicly praised the jury in the Foster-Zeitz case for having fixed the penalty at death for the relator's co-defendants, frequently visited in the court room and even attended a night session during the relator's trial and, particularly, frequently appeared on the bench, together with Judge Keller, during Darcy's trial and, on one occasion, while sitting with Judge Keller, made a comment adverse to Darcy on a critical issue of evidentiary law, and participated in the consideration of the ruling made immediately thereafter adverse to Darcy's position (7a-10a).

The petition came on for hearing on April 5, 1951, on an order so directing, which also stayed Darcy's execution until the final disposition of the petition by the court below. The Commonwealth moved orally to dismiss the petition as insufficient in law.

The grounds raised by the petition for habeas corpus filed in the District Court were not set up in the first petition for habeas corpus filed to the Supreme Court of Pennsylvania. Because of this the District Court further stayed Darcy's execution to permit him to exhaust his State remedy, by filing a second petition for habeas corpus to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied the second petition for habeas corpus filed to it, sub nom. *Commonwealth vs. Claudy*, 367 Pa. 130, 79 A. 2d 785, based on every substantial ground alleged in the present petition. The instant case then came on for further hearing on April 10 and 11, 1951. Darcy moved orally in the alternative for (1) the writ, or (2) for an additional stay pending application by him to the Supreme Court of the United States for certiorari. On April 11, 1951, the District Court

dismissed the petition, pointing out that by the terms of the orders the stay of execution was at an end. The District Court filed an opinion reported sub nom. *United States vs. Handy*, 97 F. Supp. 930.

After the dismissal of the petition and the denial of further stay by the District Court, application for certiorari was made to the Supreme Court of the United States and the application denied. See 342 U. S. 837. Darcy, meanwhile, on April 11, 1951, had appealed to the United States Court of Appeals for the Third Circuit.

The District Court having refused a certificate for probable cause for appeal, Circuit Judge Maris, allowed the same. The matter was first argued on January 7, 1952 before a "three judge division" composed of Biggs, Chief Judge, Kalodner, Circuit Judge, and Burns, District Judge. Due to the seriousness of the alleged charges in the petition, the matter was reargued on December 1, 1952, nearly 11 months later, before the Court of Appeals en banc.

The District Court originally dismissed the petition without permitting relator to introduce evidence in support of his contentions. 97 F. Supp. 930. In a Per Curiam opinion filed March 24, 1953, the majority of the court (Biggs, C. J., McLaughlin, Kalodner, and Hastie, J. J.) held that the relator must be afforded the opportunity to prove the allegations set out in his petition for habeas corpus in so far as they related to the alleged atmosphere of hysteria and prejudice prevailing at his trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, since the undisputed and incontrovertible facts as shown by the record did not countervail the allegations of hysteria and prejudice. The minority of the court (Maris, Goodrich and Staley, J. J.) held that the District Court had properly dismissed the petition, in the opinion reported at 203 F. 2d 409.

The respondent thereupon filed a petition for rehearing

pursuant to Rule 33 of the Court of Appeals. The rehearing was denied on April 29, 1953. Respondent thereafter filed a petition in this court for writ of certiorari to the Court of Appeals. This application was denied on October 26, 1953. See 346 U. S. 865.

The case was remanded to the District Court for a full hearing on the indicated issues of alleged hysteria and prejudice, including the asserted excessive interest and participation by Judge Boyer in the relator's trial. A hearing was held, with the relator present, before Hon. John W. Murphy, District Judge on March 11, 12, 13, 16-20, 1954. The relator called 22 witnesses and offered 137 exhibits. The respondent called 11 witnesses and offered 6 exhibits.

After said hearing, the District Court on February 12, 1955 entered an order dismissing the petition for habeas corpus on the ground that it was satisfied that relator's proof was insufficient to establish that his trial had been fundamentally unfair (1191a-1241a).

The District Court having refused to grant a certificate of probable cause, Circuit Judge Kalodner granted a certificate of probable cause.

The matter was argued before the Court of Appeals en banc on April 4, 1955. Thereafter in a divided 4-3 opinion, the court below affirmed the judgment dismissing the petition. The majority opinion was written by Hastie, Circuit Judge, concurred in by Maris, Goodrich, and Staley, Circuit Judges. A dissenting opinion was filed by Kalodner, Circuit Judge, which was concurred in by McLaughlin, Circuit Judge. A separate dissenting opinion was filed by Biggs, Chief Judge. The opinion is not yet reported but is annexed to this petition (pp. 78-102).

Thereupon, a petition for rehearing was duly filed in the Court of Appeals. Rehearing was denied in a divided 4-3 order on July 11, 1955.

The Court below, on July 11, 1955 entered an order stay-

ing the mandate until August 15, 1955 in order to give petitioner an opportunity to make application for certiorari in the Supreme Court of the United States.

II.

Statement of Facts.

The proof adduced by petitioner that he had been tried in an atmosphere of passion, prejudice and hysteria, abetted by the excessive interest and participation by Judge Calvin S. Boyer, who was not the trial judge in petitioner's case, all in contravention of the Fourteenth Amendment of the United States Constitution, was as follows:

A.

The Local Press, By Editorials, News Stories And Comments, Prejudged Darcy's Case and Dictated An Out Of Court Campaign To Assure his Receiving The Death Penalty.

(a)

Prejudicial Newspaper Articles and Editorials: Prior to Foster-Zeitz Trial:

"The *crime* Darcy and his associates had committed was a *brutal and notorious one.* There is no doubt that great animosity was stirred in the minds of persons in the vicinage by reason of the armed robbery and the murder of Kelly

and that feeling ran high." Biggs, C. J., 203 F. 2d 407, at 414, footnote 8.

Immediately following the crime on December 22, 1947, there was a tremendous amount of newspaper publicity of an inflammatory nature. The four leading newspapers of Bucks County—"The Doylestown Daily Intelligencer", the "Bristol Daily Courier", and the "Newtown Enterprise" and the "Quakertown Free Press"—by their articles and editorials reported every detail of this passion-arousing crime and dictated an out-of-court campaign to prejudice the citizens of Bucks County against the defendants and to demand the death penalty for them. The coverage of these newspapers was widespread throughout all sections of Bucks County.[2]

The *out-of-court campaign* carried on by these newspapers—and, particularly, "The Doylestown Daily Intelligencer"—to dictate the death penalty for the relator, as well as for the other defendants, commenced immediately following the holdup and murder, grew in intensity and

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[2] The population of Bucks County during 1947 and 1948 was 107,715 (Rel. Ex. 124, Pa. Manual 1947-1948). The "Doylestown Daily Intelligencer", a daily newspaper, was located in Doylestown Borough, the County seat (pop. 5262), having a circulation in 1948 of 5329, primarily in the center of the county—Doylestown, Newtown, and parts of Montgomery Valley, although it was widely distributed throughout the county. The "Bristol Daily Courier", a daily newspaper, was located in Bristol Borough (pop. 11,895), having common ownership with the Doylestown Daily Intelligencer, and had an average circulation of 5,397, primarily in eastern and lower Bucks County and, particularly, in Morrisville, Penndel, Bristol Twp. and Bensalem Twp. During this period the "Bristol Daily Courier" received its news coverage of the crime, as well as of both trials, from the "Doylestown Daily Intelligencer". The "Newtown Enterprise", a weekly newspaper, located in Newtown Borough (pop. 2,009) had a circulation in 1948 of 1,972, within a five mile radius of Newtown. The "Quakertown Free Press", a weekly newspaper, located in Quakertown Borough (pop. 3,150), had a circulation of 5,000, principally within a 25 mile radius of Quakertown (392a; 208a, 239a; 279a, 383a, 385a-387a; 273a, 389a-390a).

reached its climax with the reporting of the Foster-Zeitz trial.

The reports of the crime were detailed, headlined, front-page articles immediately following the murder on December 22, 1947;[3] reports of the crime were featured in many of the Doylestown Daily Intelligencer issues during January, February, March and April down to the date of the beginning of the Foster-Zeitz trial;[4] and *grew in intensity during the Foster-Zeitz trial*, reaching its climax in the Doylestown Daily Intelligencer issue of Saturday, June 5, 1948.[5]

The newspaper articles were uniform in their characterization of the defendants as "bandits" "thugs" "trigger happy youths" and "Philadelphians". The articles were more than newspaper coverage of a crime; they were in the nature of crusades against these defendants and other "outlanders" who dared to come into Bucks County to commit crimes.

Articles, editorials and comments were published in said newspapers from December 23, 1947 to May 22, 1948, continuously reminding the public of Bucks County of the heinous nature of the crime:

> The Intelligencer issue of *December* 24, 1947 (Rel. Ex. 14-15; 959a, 963a), under the heading "*Bandits Admit*

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[3] **Pre-trial Foster-Zeitz and Darcy:** Doylestown Daily Intelligencer, December (6 issues), Rel. Exs. 12 to 22 incl.; January (4 issues), Rel. Exs. 23 to 29 incl.; February (6 issues), Rel. Exs. 31 to 42 incl.; March 1 and 3 (2 issues), Rel. Exs. 43 to 45 incl.; April 2, 3, 17 (3 issues), Rel. Exs. 46 to 48 incl.; Newtown Enterprise, Rel. Exs. 107, 108, January 1, 1948 (953a-974a; 976a-981a-998a; 999a; 1001a; 1106a, 1108a).

[4] **Pre-Foster-Zeitz Trial:** Doylestown Daily Intelligencer: May 7, 12, 14, 19 (4 issues), Rel. Exs. 49 to 54 incl. (1005a, 1007a).

[5] **Foster-Zeitz Trial:** Doylestown Daily Intelligencer, May 24, 25, 26, 27, 28, 29 (6 issues), Rel. Exs. 55 to 66 incl.; June 1, 2, 3, 4, 5, (5 issues), Rel. Exs. 67 to 79 incl. (1009a-1040a; 1044a-1074a).

Shooting Five Persons in Holdups" referred to the defendants as "*trigger happy*" youths, quoted the relator as "*boastful*" and mentioned that they were *involved in a series of tavern robberies in the Bucks and Philadelphia Counties area.*

The Intelligencer issue of *December* 26, 1947 (Rel. Exs. 16-17; 964a, 966a), under the heading "Murder Now Faces the Four Bandits", in a subheading referred to the fact that "Dead Man Was Shot on Outside of Feasterville Inn When Bandits Fled After Shooting Two Other Men *Callously* During the Holdup".[6]

The Intelligencer issue of *December* 27, 1947 (Rel. Exs. 18-19; 967a-969a) in another headlined frontpage article referred to the prosecution of the "*Philadelphia's Four Young 'trigger happy' bandits.*"

The Intelligencer issue of *December* 29, 1947 (Rel. Ex. 21; 972a-973a) in a headline frontpage article, under the heading "Murder Victim Funeral Held Last Saturday" referred to the murder of Kelly—a "*Popular Citizen of Trevose Area*" and again referred to the four defendants as "*trigger happy bandits.*"

The Newtown Enterprise weekly issue of January 1, 1948 (Rel. Exs. 107-108; 1106a-1110a), under the frontpage heading: "*Easy Xmas Money Was Bandits Aim*" referred to the "Four Philadelphia Bandits Who Shot Up Two Taprooms in Lower Bucks County.".

Simultaneously with the coverage of the crime there commenced in the Doylestown Daily Intelligencer *an editorial policy* designed to secure the electric chair for the youths

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[6] Under sub-heading **"Feeling Runs High"** it is stated: "The general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the youthful bandits to trial, and that it is a **'break' for society** at large to have the trials in Bucks County rather than in Philadelphia" (965a, 966a).

involved in the Feasterville Inn holdup. Said editorial campaign started with the editorial, headed: *"Fast Police Work"* in the Intelligencer issue on *December* 27, 1947 (Rel. Ex. 20; 970a-971a).[7] This editorial especially condemned a Philadelphia jury which had recently given the killer of two cops life imprisonment instead of the electric chair. Shortly thereafter another passion-arousing editorial headed *"Errors of Jurors"* appeared in the Intelligencer issue of *December* 31, 1947 (Rel. Ex. 22; 974a-975a). This editorial referred to *"Criticism of the Inefficiency of Jurors"* and stressed that particularly in murder cases *"juries frequently render verdicts that it is difficult to explain"*. This editorial did not advise the reader that each case must be decided under the evidence and under the law.

The newspaper publicity of the offense did not diminish in its intensity within a week or two after the crime. Periodi-

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[7] **FAST POLICE WORK**

THE ROUNDINGUP of the young gunmen who robbed the Feasterville and Penndel cafes and admitted many other robberies, is something for which we can thank the police of the county and Philadelphia.

What the public and the police will be watching closely is what is done to these potential killers when they come before the bar of justice.

One of the victims of the **callous shootings** has since died.

Something else that is particularly worth while remembering is the statement of one of the witnesses that one of the **young gunmen** remarked that it was lucky that no State Police were on the scene, because they also would have been shot.

When we stop to consider the number of policemen who have been killed by **trigger-happy bandits**, it is not difficult to believe that the gangster meant what he said.

We have always wondered why the police so often take chances with wanted men who are known to be gun-toters and potential killers.

It is especially surprising in view of the miscarriage of justice in Philadelphia recently * * * when a jury predominantly made up of women, gave the killer of two cops life imprisonment instead of the electric chair, especially in view of the previous record of the killer (970a, 971a).

cally, until almost preceding the Foster-Zeitz trial, there appeared reminders of the holdup and killing, as well as other holdups in which these youths had been involved, and also reminders of the danger of leniency in dealing with these defendants.

"The Gossiper" column in the Intelligencer issue of January 16, 1948 (Rel. Ex. 25, 979a) stressed that if *"Courts and jurors were to dispense with a lot of the sentimentality about criminals * * * the general public would not face so many horrible crimes as horrify newspaper readers daily."*

An editorial in the Intelligencer issue of February 2, 1948 (Rel. Ex. 31; 982a-983a) headed *"Who'll Be the Next"* referred to the current gruesome story appearing in the metropolitan newspaper describing the brutal beatings of aged men and women in their shops by holdup men. The editorial stressed that "If juries and courts will make examples of these cowardly enemies of society there will be fewer of their assaults. * * * *It would be lamentable if citizens were forced to take the punishment of them into their own hands"* (983a). (Italics supplied.)

The Intelligencer issue of February 6, 1948 (Rel. Exs. 34-35; 984a-988a) contained an article headed *"Less Power for Juries,"* under a Harrisburg dateline, and discussed a Philadelphia judge's "proposal to relieve juries of the power to fix penalties in cases involving first degree murder" on the ground that jurors "do not know how to exercise it" (984a, 985a).

The Intelligencer issue of February 10, 1948 (Rel. Exs. 36-37; 989a-991a) under the heading "Four Youths Indicted for Feasterville Murder" again reported on the front page the passion-arousing details of the crime. The article referred to the precautions taken by the four State Troopers, the sheriff, two deputy sheriffs and county detectives to keep these "trigger happy bandits" in custody while being

brought from the Bucks County Prison to the courthouse (989a, 990a).

Almost simultaneously with the indictment there appeared in the Intelligencer issue of February 11, 1948 (Rel. Ex. 38; 992a-993a) an editorial designed to arouse the passions of the readers. The editorial entitled "*Enraged Citizens*" condemned leniency by courts and juries in dealing with criminals and stated that although "*Mob law* is not the kind we want in this country * * * but there probably were thousands of women, * * *, who felt like cheering when they read that" a convicted rapist, who had been merely fined $25.00 had been "*tarred and feathered.*"

The Intelligencer issue of February 16, 1948 (Rel. Exs. 40-41, 995a-997a) carried the frontpage headlined article "Police Connect Six Bandits Arrested Here to a Number of Robberies and Holdups" and in heavy type headlined that "They Also Know Members of the Boy Murder Gang."

Another frontpage article of the same issue (Rel. Ex. 40; 994a) under the heading, "10 *Young Problems*" stressed that "Something to worry about in the way of Juvenile Delinquency has been furnished by ten Philadelphia boys now incarcerated in the Bucks County Prison," and that "Four of the Boys Are Charged With Murder."

Two days later in the Intelligencer issue of February 18, 1948 (Rel. Ex. 42; 998a), an editorial appeared, headed "*Time For an Example.*" It stated that "The Overflow of Philadelphia's Young Criminals Into Bucks County Might, It seems Reasonable to Believe, Be Discouraged if the Crooks were given Sentences which would be impressive and get Headlines Large Enough to be Seen and Become Impressive. *Stiff Sentences have had that effect before.*"

The Intelligencer issue of March 1, 1948 (Rel. Ex. 43; 999a-1000a) under the heading "Charged With Murder, Asks Separate Trials," quoted Judges Keller and Boyer as preferring "to have a combination trial if possible, covering all

defendants" and as being critical of the relator's application for a separate trial on the ground that "separate trials in these cases will mean that it may take a year to dispose of the cases."

The Intelligencer issue of April 2, 1948 (Rel. Ex. 46; 1001a-1002a) contains a reprint of an editorial of the Philadelphia Inquirer, entitled "*Mild Sentence For Murder*," showing an editorial policy against leniency in murder cases and against considering each case upon the facts and law thereof.

The most inflammatory editorial is that headed: "*If Sob Sisters Lay Off*," in the Intelligencer issue of April 17, 1948 (Rel. Ex. 48; 1003a-1004a). The editorial quoted Judge Harry McDevitt, of Philadelphia, as telling three holdup men, whom he had sentenced to from 10 to 30 years, that: "You wise guys start out with guns and usually wind up in the electric chair." The editorial commented that: "Unfortunately * * * there still are Judges and Pardon Boards not yet convinced that thugs of that type should not be given an early opportunity to prey on the public. It seems to be time to stop making guinea pigs of the lawabiding members of society."

The editorial policy against lenient sentences appears again in the Intelligencer issue of May 7, 1948 (Rel. Ex. 49; 1005a-1006a). In an editorial headed: "*Jurors Rebuked Again*," this editorial referred to a judge in Philadelphia having twice rebuked a jury for soft-hearted decisions. It further commented that:

> "It makes it more and more apparent that untrained men and women, not familiar with court rules or the proper weighing of evidence are lacking in temperament or ability to serve efficiently."

Foster-Zeitz Trial:

The trial of relator's two companions, Foster and Zeitz, started on Monday, May 24, 1948 and ended on Friday, June 4, 1948. This trial was highly publicized in the newspapers, which were distributed throughout Bucks County —all in headlined frontpage articles.

The Intelligencer each day carried detailed accounts of all phases of the case, from the voir dire examination of the jurors, to the almost verbatim testimony of each eye witness at the Feasterville Tavern holdup, to the almost verbatim demand for the death chair by the District Attorney in his closing summation.

The news coverage of the trial was more than fair comment on what transpired in the courtroom. The articles were dramatic and passion-arousing.

The Intelligencer issue of May 24, 1948 (Rel. Exs. 55-56; 1009a-1012a) carried the frontpage feature: "Feasterville Murder Case Defendants Go on Trial." Curiously, this article again reported: "Only two of the defendants charged with the murder will go on trial this term. * * * The other two defendants, David Darcy, 22, and Felix Capone, 16, will be tried at a later term of court." The article referred to Foster and Zeitz having been "* * * brought into court by two State Troopers * * * other guards and Sheriff's deputies were stationed nearby * * *."

The Intelligencer issue of Tuesday, May 25, 1948 (Rel. Exs. 57-58; 1013a-1017a), again gives a play by play description of the selection of the voir dire examination of the jurors, and the names of the jurors selected were boxed on the frontpage under the heading: "KELLY MURDER JURY." This article also refers to the fact that: "Two other defendants will be tried for the same crime at a later term of court * * * David Darcy, 22, and Felix Capone, 16, also

Philadelphians." It stated the defendants were charged with holdups in Philadelphia, Montgomery and Delaware Counties and in South Jersey, in one of which holdups a Philadelphia city fireman had been shot.

The same issue of the Intelligencer (Rel. Ex. 57; 1018a) carried a frontpage article entitled: "*MERCY IS OVER-DONE*," under a Washington dateline, quoting Mr. Justice Robert H. Jackson of having accused his Supreme Court colleagues of giving hardened criminals too many chances of getting out of jail.

The May 26, 1948 issue of the Intelligencer carried another headlined frontpage article (Rel. Exs. 59-60; 1019a-1023a), and the names and addresses of the jurors selected appear in heavy block type on the front page under the heading: "Zeitz-Foster Murder Jury." The article refers to the trial of "Two *Philadelphia* Youths Charged With the Murder of William Kelly." The article referred to Judge Boyer having issued a special venire of 50 jurors to be returned the following morning, the original panel having been exhausted.

The Thursday, May 27, 1948 issue of the Intelligencer (Rel. Ex. 61; 1024a) contained a frontpage photograph headed "MURDER DEFENDANTS ON THE WAY TO COURT," with the notation: "Handcuffed to police are two Philadelphia youths on trial in the Bucks County Court House * * *." The photograph shows the defendants handcuffed to two state troopers, sheriff and deputy sheriff. The same issue (Rel. Exs. 61-62; 1025a-1030a) carried the headlined frontpage story entitled: "128 Jurors Called in Murder Trial, But Only 11 Seated," and again carried a blocked list of the "ZEITZ-FOSTER MURDER JURY." The article referred to the fact that: "The fourth day of the trial opened this morning shortly after 10 o'clock and still the case had not been opened to the jury by the Commonwealth * * *."

Much was made of the exhaustion of the second venire of the jurors and of the necessity for calling a third venire.

The Friday, May 28, 1948 issue of the Intelligencer (Rel. Exs. 63-64; 1031a-1037a) carried the headlined frontpage article entitled "JURORS VISIT MURDER SCENE, TESTIMONY IS UNDER WAY, LANDLORD IDENTIFIES THREE." The article refers to the "Trial of two members of a Philadelphia Boy-Bandit Gang that *killed a Trevose man, made a cripple out of another man for life*, and injured several others in a holdup at the Feasterville Inn last December 22." The article quotes District Attorney Biester as having "Left little doubt in the minds of those who heard him that when he makes his next speech to the jury the Commonwealth will ask for the death penalty." The article refers to Kelly (the deceased) as "A highly respected citizen of his home community * * *." The article stated that: "It took exactly 147 jurors to get the 14 required for this trial. It took 17 hours of questioning. * * *." The article carried the names and detailed accounts of the testimony of the various witnesses. One witness, John R. Naysmith, a spectator at the holdup, was reported as testifying: "I saw Zeitz and Foster in front of the bar, I also saw David Darcy there." Repeated references were made to the activities of Darcy during the holdup, including "I heard Darcy ask where the hero was that hit me * * * 'Where are the police'; I feel like shooting a couple of them" (1031a, 1032a, 1033a, 1034a, 1035a, 1036a).

The May 29, 1948 issue of the Intelligencer (Rel. Exs. 65-66; 1038a-1043a), carried the frontpage headline: "*Heard Feasterville Bandits Say They Would Also Like To Have Shot Some Cops.*" The article referred to:

> "The horror of the Feasterville's Tavern Murder during last year's Christmas Season, when an innocent outsider was fatally shot, is being related in detail again today in Bucks County Criminal Court."

"The spectacle of a quartet of wise-cracking trigger happy young bandits who invaded the Feasterville Inn last December 22, at night, shooting down patrons '*just for the fun of it*' was described from the mouths of numerous Commonwealth witnesses all day yesterday."

The article referred to "Hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later." Again the detailed testimony of the Commonwealth witnesses was given as to the passion-arousing details of the crime, wherein time and time again the name of Darcy and his conduct appeared, although Darcy was not then on trial.

The Monday, June 1, 1948 issue of the Intelligencer (Rel. Exs. 67-68; 1044a-1048a) in a frontpage article headlined: "*Why Did They Shoot Me? Murdered Man Asks After He Was Victim in Feasterville Shooting,*" starts with this passion-arousing paragraph: "Crippled for Life, a 46-year-old Philadelphian was wheeled into court this morning on an invalid chair." The article reported Hellerman as testifying that he "was playing shuffle board in a side room of the Inn when David Darcy, 22,—who will be tried later—came in and fired two shots." Repeated references were made to Darcy's conduct during the shooting. Hellerman is quoted as testifying "I have pain all of the time in my legs, I no longer have normal control of my organs. I can move my hands but not my legs."

The Tuesday, June 2, 1948 issue of the Intelligencer (Rel. Exs. 70-71; 1048a-1054a) another frontpage article headed: "Zeitz Admits Firing Two Shots Out of Auto" starts "'You ought to try this some time. * * * it's a lot of fun' a 16-year-old Philadelphia boy-bandit, remarked to patrons of Deacon's Inn near Penndel during a pre-Christmas holdup last December, less than 30 minutes after a holdup and murder at nearby Feasterville." The article referred to

the "trigger happy bandits," "four Philadelphians," including "Darcy * * * who will be tried later." The article stated: "Slowly, but carefully, the Commonwealth is leading up to the point when it will ask that the jury demand that Zeitz and Foster pay with their lives for the death of William Kelly." The article referred to Assistant District Attorney Curtin's having read an 8-page typewritten statement of all defendants to the jury. The statements mentioned that "All four defendants said everything in the statement was true." The article further refers to other holdups committed by Darcy and his companions, in one of which holdups he was referred to as having stated: "That he had just shot a couple of men at another place."

The Newtown Enterprise issue of June 3, 1948 (Rel. Exs. 109-110; 1111a-1116a) reported in a frontpage article the passion-arousing details of the crime under the headline: "Youths Escapade Ends in Murder." It referred to:

> "The sordid tale of thrill-seeking youths whose escapade ended in murder is in its second week in criminal court at Doylestown * * * of the hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later * * *."

This article, like the daily accounts in the Intelligencer, stressed Darcy's roll in the holdup.

The Thursday, June 3, 1948 issue of the Intelligencer, (Rel. Ex. 72; 1055a) in another frontpage article headed: "*Prosecutor's Plea*" quotes District Attorney Biester in his summation to the jury, as having declared:

> "*Morally*, these boys, Zeitz and Foster, *killed three men* the night of the Feasterville holdup" * * * "William Kelly was mortally wounded by a shot from the bandit gun, and the two others were horribly crippled,

one for life". "Even a surgeon's knife cannot restore one of the victims to normal life."

The District Attorney also emphasized the fact that the defendants' callousness was outrageous when the bandits wished the victims of a holdup, "a Merry Christmas" before leaving the Feasterville Inn shooting escapade:

> "Not satisfied with the Feasterville Affair, they went to another place the same night and held it up with guns. *What one did, was the attitude of all.*"

The same issue of the Intelligencer (Rel. Exs. 72-73; 1056a-1061a), carried another frontpage article headed: "Defense in Murder Trial Decides Not To Offer Evidence." This article stated: "* * * Sensational 30-day crime spree that ended in a murder * * *." Later in the article it is stated: "Seven shootings, one a fatal affair, during a 30-day hold-up spree, were enumerated in court as the written documents were read by Assistant District Attorney Willard S. Curtin" (1059a). The article stated that:

> "Seven persons were shot, one was murdered and nine places were held up by the four accused Philadelphians, according to the statements submitted in evidence in court yesterday, and signed by Zietz, Foster, Darcy and Capone."

This article is basically incorrect inasmuch as Darcy did not participate in four of the holdups and the statements submitted clearly so state.

The Friday, June 4, 1948 issue of the Intelligencer (Rel. Exs. 75-76; 1062a-1066a) in a frontpage article headed "FATE OF ZIETZ AND FOSTER IN JURY'S HANDS," referred to the defendants as two "trigger happy Philadelphia youths" and to the "brutal killing of William Kelly."

The article gives excerpts of Judge Boyer's charge to the jury, *including a statement that* "in his opinion the death penalty is warranted in this case." Included in the excerpts of Mr. Biester's summation were his comments that these boys are "*not normal American boys*," and that "they were as brazen as they could be during this trial and during their escapades of crime."

The Saturday, June 5, 1948 issue of the Intelligencer (Rel. Ex. 78; 1071a-1072a) published and circulated—*two days before the relator's trial*—several front page articles. The featured article was headed:

> "JUDGE BOYER PRAISES JURY FOR VERDICT CONDEMNING 2 KILLERS TO ELECTRIC CHAIR.
> Court Tells Eight Men and Four Women He Could Not See How Any Other Course Could Have Been Taken —Two Defendants Appear To Be Unmoved."

Another frontpage article of this Saturday, June 5, 1948 issue was headed "Two Young Killers Turn To Bible For Comfort" (Rel. Exs. 78-79; 1068a-1069a). This article referred to the convictions of Foster and Zeitz by a "Bucks County Jury * * * *Who wasted no time on their deliberation* before returning a verdict of guilty of murder in the first degree with death penalty recommended." This article referred to the costs of the prosecution to the county.

Another frontpage article of said Saturday, June 5, 1948 issue (Rel. Ex. 78; 1070a) was headed:

> "HELD FOR BURGLARY.
> 3 Youths Lived Near Zietz and Foster"

The article referred to the arrest of three Philadelphia youths, including Robert White, 18, and merely referred to the fact that they lived in the vicinity of an inn that was held up by the two convicted murderers, who were sentenced to death here, the preceding day.

Finally, in the same issue of Saturday, June 5, 1948,—*two days before the relator's trial started*—under the column "We Noticed" appeared two articles (Rel. Ex. 79; 1074a). The first mentioned the "thousands of dollars it cost the taxpayers to capture, try and convict just two of the *trigger happy bandits* recently convicted and sentenced to the electric chair." The second article quotes a police official as saying that: "* * * *If the killers of Kelly were not given the death sentence, the electric chair should be destroyed.* * * *and his opinion being agreed with by those who heard the statement.*"

Darcy Trial:

The Intelligencer issue of Monday, June 7, 1948 (Rel. Exs. 80-81; 1075a-1078a), which was published and circulated before the selection of any jurors, contained a frontpage article headed: "UP TO LATE HOUR THIS A. M. NO JUROR HAD BEEN GOTTEN FOR DARCY MURDER TRIAL." The article referred to the relator "Whose partners in crime * * * were found guilty last Friday and sentenced to die in the electric chair * * *" as having gone on trial that morning in Judge Keller's Court. The defendants were referred to as a "trigger happy gang." The article states:

> "From the start of the questioning of jurors this morning, it was evident that great difficulty will be met in selecting a jury.
>
> "Jurors informed the Court that they had read a lot about the case and a number said that they had 'formed a fixed opinion that could not be changed by the evidence.'"

The Intelligencer issue of Tuesday, June 8, 1948 (Rel. Exs. 82-83; 1080a-1085a) contained another frontpage arti-

cle "JUROR BEING QUESTIONED THROWS BOMB SHELL IN COURT." The article referred to a prospective juror's statement on voir dire examination that "* * * *It's the coldest blooded murder that I ever read about.*" The article referred to Darcy as a member of: "A four-team Philadelphia bandit gang that shot up the Feasterville Inn * * * and then held up the Deacon's Inn at Penndel" on December 22.

The same, June 8, 1948, issue of the Intelligencer (Rel. Ex. 84; 1086a) contained a Guest Editorial from the Philadelphia Evening Bulletin entitled "TWO MURDER CONVICTIONS." The editorial commended the Doylestown jury for not being subject to "*maudlin sympathy*" in failing to recommend the death penalty and cited the *Foster-Zeitz verdict as "a vindication of women as jurors.*"

The foregoing newspaper articles and editorials constitute convincing proof of the policy of the press to secure a death penalty in the relator's trial. They crystalized the public sentiment and indignation that existed in Doylestown and in Bucks County or June 7, 1948 when the voir dire examination of the jury panel commenced.

B.

Magazine Article.

The publicity following the Feasterville holdup on December 22, 1947 was so widespread in scope and intense and passion-arousing in nature that it culminated in a magazine article entitled: "*KILL-CRAZY*" in the June 1948 issue of a popular sensational national magazine known as "*Front Page Detective,*" (Rel. Ex. 136). This article contained a detailed account of the Feasterville holdup and murder, as well as of other holdups, in some of which Darcy

was not involved, together with the pictures of the relator and the other defendants. *The article being local in interest, was necessarily circulated and widely read throughout Bucks County* (557a-560a; 567a-575a; 589a-592a; 601a-602a). *This magazine was seen in the courtroom during the relator's trial in the hands of courtroom spectators* (557a-560a; 567a-575a; 581a-592a; 601a-602a).

C.

Radio and Television.

There was wide radio and television coverage both of the holdup and apprehension of the defendants, as well as of the Foster-Zeitz trial. Radio Station WFIL, of Philadelphia, with a broadcast radius covering all of Bucks County (281a-286a), as well as Radio Stations WBUS of Doylestown (287a-288a), and WBUX of Quakertown, carried detailed reports of the Foster-Zeitz trial. The Quakertown Free Press issue of May 27, 1948 (Rel. Ex. 123(c); 1125a-1126a) contained a frontpage article headed: "COURT NEWS POPULAR WITH WBUX LISTENERS." The same newspaper's issue of June 10, 1948 (Rel. Ex. 123(d) (e); 1127a-1128a) in another frontpage article stated:

> "The murder trials at the courthouse, Doylestown, are being covered by WBUX reporters, and at noon and evening the undertakings of the court are read over the air" (1128a).

D.

The Aforesaid Newspaper Campaign Resulted In Public Passion, Prejudice and Hysteria, Demanding the Death Penalty, Irrespective of the Evidence.

The *campaign to assure the death penalty* for these youths *was crystallized in the expressions of public sentiment* generated by said newspaper articles and editorials, as well as by the radio and television broadcasts. There was a widespread popular sentiment in all sections of Bucks County that all the defendants involved in the Feasterville holdup should be sentenced to the electric chair, *irrespective of the evidence and the law in each case*. This popular sentiment against these youths *permeated throughout the entire Bucks County* (124a-133a; 159a-179a; 181a-207a; 253a-272a; 314a-340a; 431a-473a; 585a-605a).

The relator called seven witnesses to substantiate the contention as to the public sentiment of prejudice and hysteria: *Rev. Frank J. Damrosh*, St. Paul's Episcopal Church, Doylestown, Pennsylvania (124a-133a); *Rev. William Babinsky* of Feasterville, Pennsylvania, Pastor of the Dutch Reformed Church of America (159a-179a); *G. Coe Farrier*, an attorney and former city solicitor of Philadelphia (181a-207a); *Dr. Carl J. Hoffman*, of Philadelphia, a psychiatrist (253a-272a); *Howard R. Price*, of Charlottesville, Virginia, formerly of Andalusia, Bucks County, an auto parts salesman (314a-340a); *Miss Alice Patterson*, of Margate, New Jersey (392a-419a); *Knickerbocker Davis*, Doylestown, Pennsylvania, a journalist (431a-473a); *Mrs. Inez Darcy Heckman*, a sister of the relator (585a-605a).

These witnesses, in effect, testified that the public sentiment against the relator and his companions prior to the relator's trial was that they "*should be hanged*," "*ought to be*

shot," "ought to be stamped out like bugs" (166a), *"should burn"* (188a, 203a), *"ought to be hanged,"* or *"get the chair"* (257a), "should be lynched, hanged or shot" (318a, 438a), "should burn" (394a-395a), should get the "hot seat," or should be "taken out and shot or strung up" (436a), and "did not deserve a trial" (438a, 587a), but "should be strung up" (588a).

Mr. Knickerbocker Davis, a magazine writer, and former newspaper correspondent, testified that he was interested in the problem of juvenile delinquency, and that after the Feasterville holdup on December 22, 1947, he *made an independent survey of public opinion of the crime in the Borough of Doylestown and its environs as far as New Hope*. Mr. Davis' survey showed that 70% of the 100-150 persons interviewed by him were shocked and outraged by the crime and were of the opinion that the participants deserved the death penalty (433a-435a; 438a; 441a-443a; 448a).

The public sentiment and indignation against these defendants was generated not only by the type of the crime involved, but also by the fact that the participants were Philadelphia youths who had entered Bucks County to commit the holdups with which they were charged. The newspaper articles and editorials above designated make frequent references to the fact that the defendants were Philadelphians who had made "criminal forays into Bucks County," and the popular sentiment generated by said newspaper articles and editorials reflect the public indignation against the "*outlanders*" from Philadelphia (259a, 260a, 318a, 333a-337a; 394a-396a).

E.

Relisting of Darcy Trial.

Originally the relator's trial was not scheduled to be held until the term following the trial of Foster and Zeitz. Suddenly, on June 4, 1948, at the end of the Foster-Zeitz trial, it was decided to hold the Darcy trial immediately on the completion of his companions' trial.

It is uncontradicted that both Judges Boyer and Keller were desirous of having a joint trial of all defendants in order to save time and expense. Both judges were opposed to petitions by Darcy and Capone, asking for separate trials (Doylestown Daily Intelligencer, Monday, March 1, 1948) (Rel. Ex. 43, 999a-1000a).

Thereafter, Darcy and Capone were granted separate trials, pursuant to the Pennsylvania Act of March 31, 1860, P. L. 427, Sec. 40 (19 P. S. §785).

The newspapers until Friday, June 4, 1948 reported unequivocally that the Darcy trial was not to be held during the same term of court as the trial of Foster-Zeitz. The Intelligencer issue of *Friday, May* 14, 1948 (Rel. Ex. 51; 1007a-1008a) commented: "* * * but only two will be tried during the approaching term * * * David Darcy and Felix Capone will be tried later." The Intelligencer issue of *Monday, May* 24, 1948 (Rel. Exs. 55-56; 1009a-1012a) stated that: "* * * only two of defendants charged with the murder will go on trial this term * * * Other two * * * tried at later term of court." This statement is reiterated in the issues of *May* 25, 1948 (Rel. Ex. 57; 1014a), of *May* 28, 1948 (Rel. Ex. 64; 1034a), *May* 29, 1948 (Rel. Ex. 65; 1033a), June 1, 1948 (Rel. Ex. 67; 1044a), *and June* 2, 1948 (Rel. Ex. 70; 1049a). *None of the articles mentioned that Darcy's trial was to start immediately after that of Foster and Zeitz.*

Neither District Attorney Biester, nor Assistant District Attorney Curtin, *repudiated the stories* published by the newspapers as a fact that the relator would be tried at the next term of court (795a; 897a-898a).

The Doylestown High School graduation exercises, which for years had been held in the Bucks County Court House, were rescheduled and transferred from the Court House only at the completion of the Foster-Zeitz trial, because according to the Intelligencer, Friday, June 11, 1948, (Rel. Ex. 93), "So many murder trials are cluttering up the Bucks County Criminal Docket * * *."

F

Darcy Jurors Present in Bucks County Court House on June 1, 1948 During Foster-Zeitz Trial.

The records of the Bucks County Criminal Court show that the traverse jury selected to report on June 1, 1948 did so report in the Bucks County Court House on that date (Rel. Exs. 10 (c) and (d), 949a, 952a). The jury that was summoned to appear on June 1, 1948 was not summoned specifically to serve on relator's trial, but was summoned generally to serve for the term commencing June 1, 1948 (949a). These jurors were in the court house during the Foster-Zeitz trial and, in fact, some were on that date excused from jury service (952a). These jurors certainly had the opportunity to attend the sessions of the Foster-Zeitz trial. One, talesman Slaughter, testified that in fact he had been present in court during some of the days of said trial (1143a).

G.

So Aroused Was the Public Prejudice and Hysteria That it Was Difficult to Impanel a Jury for the Foster-Zeitz Trial.

The public prejudice and hysteria against the youths involved in the Feasterville holdup was rekindled and intensified with the *efforts to impanel a jury to try the case against Foster and Zeitz.* The Bucks County Criminal Court records indicate that the original jury panel summoned to serve on this case was exhausted before a jury was selected (Rel. Exs. 10(a)-10(g)). The Court thereupon directed that a *special venire* be issued, and the Sheriff summoned and returned from the bystanders and the county at large 50 qualified persons (Rel. Ex. 10(g)-10(h)). Thereafter, the Court found that, by reason of challenges and otherwise, *both the original panel of 120 jurors and the additional panel of 50 jurors had been exhausted without a jury being selected.* The Court thereupon issued *another order* directing the Sheriff to summon from the bystanders or from the County, 25 additional persons which he promptly did (Rel. Ex. 10(g)-10(h)). *142 persons were examined before a jury of 12 jurors* and two alternates were finally selected to serve on the Foster-Zeitz trial (Rel. Ex. 10(k)).

H.

The Public Prejudice and Hysteria Rekindled During the Foster-Zeitz Trial Became Intensified During the Selection of the Darcy Jurors.

The Feasterville holdup naturally aroused great public indignation throughout Bucks County. The atmosphere of

prejudice and hysteria resulting grew in intensity and reached its climax during the selection of the jurors to serve on the relator's trial, *so that before the jury was even selected the relator was prejudged guilty and deserving of the death penalty. It was impossible for the Commonwealth to isolate the jury panel from which the Darcy trial jury was selected from the highly publicized Foster-Zeitz trial.* As stated, the Criminal Court records of Bucks County show that this jury panel *appeared in the court house on June* 1, 1948, and that they had the best available opportunity to hear and observe that case.

In fact, one talesman, Harry T. Westlake, when asked whether he had formed an opinion as to the relator's guilt or innocence, threw a "*bombshell*" into the courtroom when he stated, in the presence of three other jurors who had already been selected for service, that:

> "* * * *It is one of the most cold-blooded murders I ever heard of*" (Rel. Ex. 5A; 1141a-1142a).

According to the record of voir dire examination of prospective jurors in the Foster-Zeitz trial, 142 jurors were examined on May 24, 25, 26 and 27 before the jury was completed. 80 jurors were examined on the voir dire examination in the Darcy trial on June 7 and 8, 1948 before the jury was completed. *In short, a total of 222 jurors were examined on voir dire examination in both trials before the juries were completed.* Both juries were selected from all sections of Bucks County and reflected the public sentiment of their respective sections.

(a)

Analysis of Voir Dire Examination.

An analysis of the voir dire examination of the jurors called for the Foster-Zeitz case shows:

Foster-Zeitz Case

	Read Newspapers	Discussed Case	Fixed Opinion
Jurors examined—	142	142	142
Not asked question—	52	62	64
Asked question—	90	80	78
Answered No—	32	48	62
Answered Yes—	58	32	16
Percentage of those asked answering yes—	63%	40%	20%

An analysis of the voir dire examination of the jurors called for the Darcy case shows:

Darcy Case

	Read Newspapers	Discussed Case	Fixed Opinion
Jurors examined—	80	80	80
Not asked question—	21	36	25
Asked question—	59	44	55
Answered No—	7	22	39
Answered Yes—	52	22	16
Percentage of those asked answering yes—	89%	50%	30%

An analysis of the voir dire examination of the jurors called for both cases shows:

	Read Newspapers	Discussed Case	Fixed Opinion
Foster-Zeitz Jurors	63%	40%	20%
Darcy Jurors	89%	50%	30%
Change between trials	26%	10%	10%

Thus, in the relator's trial, approximately one-third of the jurors called to try him who were asked the question whether they had fixed opinions, stood up in open court and said that they had fixed opinions, derived from reading newspapers and hearing the case discussed. An examination of the testimony taken on voir dire examination in the relator's trial reveals a remarkable increase in intensity and fixity of opinion—*the crystallization of public sentiment against the relator was apparent.*

I.

Judge Boyer's Excessive Interest, Attendance and Participation in the Relator's Trial Deprived him of a Fair Trial and Constituted a Denial of Due Process.

Judge Calvin S. Boyer, who presided at the Foster-Zeitz trial, evidenced his personal antagonism and hostility against all of the defendants—at least from the date of the presentation of relator's petition for severance.

The Intelligencer issue of Monday, March 1, 1948 (Rel. Ex. 43; 999a-1000a) quoted Judge Boyer and Judge Keller as commenting that:

> "Separate trials in these cases will mean that it may take a year to dispose of the cases."

After the Foster-Zeitz verdict, the Intelligencer issue of Saturday, June 5, 1948 (Rel. Ex. 78; 1071a-1072a) quoted Judge Boyer as praising the jury for its verdict condemning the "two killers to electric chair."

The Intelligencer issue of Saturday, June 12, 1948 (Rel. Exs. 94-95; 1094a-1096a) under the heading on the front page:

"JUDGE BOYER WARNS THAT BUCKS COUNTY IS TIRED OF THIEVES FROM PHILADELPHIA"

and the sub-heading headed:

"Court Warns Youth That County Intends to Do Something About It—Asks Defendant Whether He Wants to Get Into Position of Killers Who Were Sentenced to Electric Chair."

quotes Judge Boyer as asserting that:

> "We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which isn't being watched * * * What business did you have to come up here in the first place?"

Judge Boyer's comments were made in connection with the sentencing of an 18-year-old Philadelphian, Robert White, who had pleaded guilty to stealing a car radio. He is quoted as having further stated:

> "We in Bucks County are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it" (1094a, 1095a).

The foregoing newspaper articles characterized his antagonism and prejudice against all the youths involved in the Feasterville Tavern holdup.

His antagonism was crystallized in the editorial which

appeared in the Intelligencer issue of Thursday, June 17, 1948 (Rel. Ex. 105; 1103a-1104a) under the heading: "*RAUS MIT 'EM.*" Apparently, the newspaper recognized the significance of "Judge Calvin S. Boyer's warning to tough crooks from Philadelphia and other places to keep out of Bucks County or take the consequences." The editorial continued:

> "The warning has been given before, but not under such impressive circumstances.
>
> "At any rate the jurors in the Feasterville slaying case probably indicated the reaction of people in this county to the vicious lawlessness of a great many young crooks who have operated in the county.
>
> * * *
>
> "The conviction of the three young men for a wanton and unprovoked murder * * * and the imposition of the death sentence * * * together with Judge Boyer's warning * * * it is hoped will cause bandits and killers to steer clear of the county.
>
> "Getting tough has worked that way in other instances."

This editorial recognized that the verdict was an indication of not only Judge Boyer's personal sentiments but also of other Bucks Countians "* * * that leniency has merely been taken as an indication of weakness * * *".

Mr. Knickerbocker Davis testified that during the Foster-Zeitz trial Judge Boyer had told him that he thought the defendants were "hardened" and "callous criminals" (446a-448a).

Judge Boyer's attendance and participation at Darcy's trial must be taken into consideration with his expressed personal sentiments—a deep-seated antagonism and prejudice against "outlanders" and killers. The records of the

Bucks County Criminal Court indicate that, although Judge Keller did not participate in any phase of the Foster-Zeitz trial which had been presided over by Judge Boyer, that Judge Boyer actively participated, together with Judge Keller, in the relator's trial.

During the relator's trial, Judge Boyer appeared in the courtroom, together with Judge Keller, when the case was called for trial on the mornings of June 7, 8, 9, 10, 11, 12 and 14, 1948, as well as at all afternoon sessions (Rel. Ex. 115(c); 1117a-1119a). That Judge Boyer appeared on the bench at the beginning of all morning and afternoon sessions of Darcy's trial was not contradicted but was corroborated by the respondents' witnesses (312a, 362a, 379a). Moreover, it was corroborated by the Criminal Court records.

In addition to sitting on the bench with Judge Keller at the beginning of each session, Judge Boyer, at relator's trial, appeared at different times as a spectator in the court room. On two occasions he sat in a chair in the section reserved for attorneys where he could be plainly seen and observed by the jury (479a, 486a, 488a, 599a, 515a-517a, 535a, 541a, 542a-545a, 556a, 592a-593a, 613a, 617a, 628a, 727a-728a, 875a-876a, 911a; Rel. Exs. 113, 119 and 135; 1120a, 1121a and 1131a). This fact is not contradicted by the respondents' evidence. So great was Judge Boyer's interest in the outcome of this case that he sat as a spectator in the courtroom in the section reserved for attorneys during the evening session held on Friday, June 11, 1948, for the entire session, which lasted about two to two and one-half hours (487a-489a).

Further, during the Darcy trial, not only did Judge Boyer sit on the bench with Judge Keller at the beginning of each session, but on certain occasions he remained throughout the session, and on other occasions he left and then returned to the bench. On the occasions he sat on the bench with

Judge Keller, he assisted and conferred with him in the conduct of the trial of the relator and participated in various rulings, particularly regarding the admissibility of evidence (488a, 499a-501a, 540a-542a, 592a, 605a, 612a, 619a-622a, 625a, 781a, 875a-876a, 906a-907a).

It is also uncontradicted that at the session held on Saturday, June 12, 1948, Judge Boyer actively participated in the ruling of admissibility of a joint confession made by all the defendants. This question admittedly involved a difficult evidentiary problem. As a result of the ruling, the jury was permitted to take into consideration parts of the written statements of the defendants wherein Darcy admitted participation in other holdups. When Mr. Achey, the relator's counsel, objected to the offer, Judge Boyer imposed: "That applies only to cross-examination" (Rel. Ex. 5E, 1144a-1146a). Although Mr. Achey objected to Judge Boyer's participation and although Judge Boyer thereafter withdrew from the bench, the fact and effect of Judge Boyer's participation in the foregoing ruling was observable by both the spectators and jurors (479a, 535a, 541a, 612a, 781a-782a, 784a, 884a, 909a-910a). The impact of Judge Boyer's participation on the jury was necessarily great, because soon after this ruling the Commonwealth closed its case and the defense offered no evidence.

To climax Judge Boyer's extraordinary interest and participation in relator's case were the events of Monday, June 14, 1948. During Judge Keller's charge to the jury, Judge Boyer was seated in the section of the court room reserved for attorneys. Next to him was seated District Attorney Biester. Both Judge Boyer and Mr. Biester were seated so that they were plainly observable by the jurors (481a, 517a, 542a-544a, 546a-548a, 612a-613a, 628a-629a).

Towards the close of the Court's Charge, Judge Keller inquired of counsel for the Commonwealth and for the defense whether the Court had overlooked anything and

whether there were any corrections to be made (Rel. Ex. 5E; 1146a-1150a). Mr. Achey, defense counsel, answered that he had nothing to add (1148a). The Court thereupon resumed its Charge. At this point, Judge Boyer, who was seated next to District Attorney Biester, handed the latter a note. Mr. Biester read the note, then arose from his chair and approached the bench where Judge Keller was concluding his Charge. Mr. Biester succeeded in attracting Judge Keller's attention and stated:

> "I may have misunderstood part of your Charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree," (1149a).

Judge Boyer's participation and assistance in the District Attorney's correction of Judge Keller's instruction to the jury was observable by both the spectators and jurors in the court room (481a-487a, 505a-506a, 516a-523a, 542a-544a, 548a-554a, 559a, 612a-616a, 626a-629a).

Judge Boyer's attendance and participation at relator's trial—both when he sat on the bench with Judge Keller and also on the occasions when he sat in the section reserved for attorneys (especially on the Friday evening session of June 11, and the Monday, June 14 session)—was observable by the jurors and was a constant reminder to them of the Foster-Zeitz trial and Judge Boyer's praise to the Foster-Zeitz jury for their services in having rendered verdicts of guilty with death penalties. Judge Boyer's attendance and active participation was not affirmatively contradicted by the respondents.

J.

Respondents' Evidence.

The respondents' evidence, which was, in effect, adopted by the District Court and the court below, did not attempt to contradict these facts: (1) that there was newspaper publicity and editorials concerning the Feasterville Tavern holdup, as shown by the relator herein; (2) that there were public expressions of indignation as testified to by the seven witnesses called by the relator; (3) that there was widespread newspaper publicity and radio broadcasts of the Foster-Zeitz trial; (4) that Judge Boyer, both before, during and after the relator's trial displayed his personal feelings against these defendants; (5) that relator's trial was originally scheduled to start at the term following the Foster-Zeitz trial and was only re-scheduled to commence immediately thereafter during the last days of the first trial; (6) that, according to the Criminal Court records, the jury panel from which the relator's jury was drawn, appeared in the court house during the Foster-Zeitz trial and had the opportunity to attend and listen to it; (7) that the voir dire examination in relator's trial showed a marked increase in fixed opinions of the jury, so that almost *one out of every three jurors* asked the question admitted he had a fixed opinion in the case; (8) that Judge Boyer did sit both on the bench and in the courtroom almost daily throughout relator's trial and did participate in at least one ruling on the most vital question in the case. The respondents' evidence did not counter-act the cumulative effect of all the foregoing factors on the trial of the relator —the effect being of such a nature that his guilt and the death penalty which he eventually received were both prejudged by the jury.

In short, the respondent through its evidence—Judge Keller's certificate (Resp. Ex. 5; 1133a-1140a), District Attorney Biester, and Assistant District Attorney Curtin, the various tipstaves, state troopers, Doylestown police and jail wardens—was designed to establish two factors: (1) the decorum of the trial itself, and (2) the segregation of the jury.

7.

ARGUMENT.

I.

The failure of the State Court in a capital case *sua sponte* to change the venue or to continue petitioner's trial, where the case had been prejudged by the citizens of the county due to local newspaper campaign designed to secure death penalty and where the trial was suddenly scheduled to start after end of companions' trial imposing death penalties, violated the due process clause of the Fourteenth Amendment.

A

The Public Prejudice and Passion, Engendered by Out of Court Newspaper Campaign, Dictated the Imposition of the Death Penalty by the Jury Just as Effectively and Forcefully as the Physical Presence of a Mob or the Threat of Mob Violence.

The rights here violated are of the kind which this Court has always been diligent to protect. Whether federal,

guarantees of the sort here involved have been violated is a question which this Court has consistently determined itself by independent examination of the record: *Cassell vs. Texas*, 339 U. S. 282 (1950); *Haley vs. Ohio*, 332 U. S. 596 (1948); *Malinski vs. New York*, 324 U. S. 401 (1945).

The Fourteenth Amendment prohibits the conviction "* * * of one whose trial is offensive to the common and fundamental ideas of fairness and right": *Betts vs. Brady*, 316 U. S. 455 (1942); *Buchalter vs. New York*, 319 U. S. 427, 429 (1943); *Rochin vs. California*, 342 U. S. 165, 169 (1952).

As stated by Biggs, Chief Judge, in his dissenting opinion:

> "* * * The judicial process under which Darcy was tried was so distorted by circumstances, both in and out of the courtroom, as to result in fundamental unfairness. * * * By editorials, news stories and comments, the press prejudged Darcy's case and prejudiced the minds of the citizenry against him. I cannot believe that all members of the jury remained uninfluenced by these publications" (p. 101).

The majority opinion relative to petitioner's claim that he was tried in an atmosphere of prejudice and hysteria clearly shows that the majority had mental reservations in their holding that the relator's trial at the time and place in question was not a denial of due process.

The following factual findings, which the majority made on the score of the circumstances prior to and during the trial itself (aside from Judge Boyer's presence in the courtroom and participation during Darcy's trial), would have substantiated a conclusion that relator's trial at the time and place in question was a denial of due process under the Fourteenth Amendment:

> "* * * (Relator has relied upon) the daily newspaper accounts and editorial comments published in the

community during the trial of two of relator's alleged confederates, which ended only three days before he himself was required to stand trial."

"The evidence * * * indicates that during the two weeks immediately preceding relator's trial, the community in general had experienced a revival and quickening of interest in the homicide attended by many expressions of indignation against its perpetrators."

"* * * The evidence makes it very probable that they (the jurors) also know that he (Judge Boyer) had just completed the trial at which relator's co-defendants had been convicted and sentenced to death."

"* * * But another judge of the same Court, Hon. Calvin Boyer, was much in and about the courtroom during the course of this trial. Judge Boyer had just completed a trial at which relator's confederates had been convicted of first degree murder without recommendation of mercy and, according to the press, he had commended the jury for its verdict."

"* * * The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions * * *" (pp. 82, 83).

Despite these significant and critical findings and despite the uncontradicted evidence as to the increased fixity of opinion as to Darcy's guilt as evidenced by the voir dire examination, the majority of the Court below concluded that it was not convinced "* * * that failure to follow the 'wiser course' was a denial of the essence of fair trial" (p. 82).

The majority's conclusion that relator was not tried in a community, so aroused against him that a fair trial was

impossible, was based upon the misapplication of two legal principles: (1) that *Frank vs. Mangum*, 237 U. S. 309 (1915); *Moore vs. Dempsey*, 261 U. S. 86 (1923), and *Powell vs. Alabama*, 287 U. S. 45 (1932), warrant a conclusion that one was tried in a community so aroused against him that a fair trial was impossible *only* where there is proof that physical presence of a mob or a threat of mob violence has dominated a criminal trial; and (2) that the fact that relator was afforded the right of voir dire examination necessarily nullified his claim that he was tried in an atmosphere of prejudice and hysteria.

The rationale of *Moore vs. Dempsey*, 261 U. S. 86, which requires that a defendant be afforded a trial free from mob domination and from passion and prejudice, can usually be satisfied in only one of two ways, should such an atmosphere exist where and when the trial *is* scheduled,—by a change of either the time or the place of trial.

When the record discloses that local newspapers printed inflammatory stories and articles between the date of the crime and the date of his companions' trial; that for two weeks during the trial of his companions, the newspapers printed inflammatory accounts thereof; that the trial judge in the first case publicly praised the jury for having imposed the death penalties; that the public prejudice and passion were rekindled and intensified by the news accounts of the first trial; *then* passion and prejudice have reached a stage, from which they should be permitted to subside by the passage of time, before holding a trial for the crime which precipitated the newspaper campaign and passion and prejudice in the area in which they occurred.

In *Shepherd vs. Florida*, 341 U. S. 50, the respondents attempted to establish that the violence and attendant passion were isolated from the trial by space and time. They asserted that all the violence occurred far from the court house, and that by the time of the arraignment, on August

12, the whole of the county was so quiet and peaceable that the petitioners remained there until the trial on September 1 "without the slightest untoward incident being revealed by the record."

The Supreme Court, in the *Shepherd* case, in effect, found that this prejudicial atmosphere—engendered by inflammatory newspaper publicity that reached into every corner of the county—had not subsided by the time of trial. *The fact that defendants could be safely imprisoned within the county was but the slightest evidence of a healthy attitude* —contradicted by the Court's special order compeiling the search of persons and property entering the courtroom, and continuous newspaper publicity.

Likewise, in the instant case, the mere fact that the trial was conducted with dignity and decorum, without any hostile congregation or demonstration, without the courtroom having been crowded and with the precautions having been taken for keeping the jury under strict guard—does not necessarily warrant a conclusion that the trial was not held in an atmosphere of prejudice and hysteria.

The Supreme Court has recognized that violence is not so easily replaced by calm. See *Milk Wagon Drivers Union vs. Meadow Moor Dairies, Inc.*, 312 U. S. 287 (1941), in which the court stated:

> "* * * In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful * * *" (p. 294).

It is submitted that the inflammatory and prejudicial articles and editorials of expressions of public passion and prejudice against Darcy and the increase in fixity of opinion permeated the relator's trial and contaminated it as much as if there had been evidence of the physical presence of a mob or a threat of mob violence.

An examination of the newspaper articles and editorials shows t' ·t the newspapers' reporting of the crime and of the Foster-Zeitz trial was not factual and that the editorials were not fair comment (953a-1116a, 1123a-1130a).

A. Russell Thomas, reporter for the Daily Intelligencer, when questioned relative to the statement in the article in the December 26, 1947 issue (Rel. Exs. 16-17, 964a-966a)—that "the general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the bandits to trial, and that it is a 'break' for society at large to have the trial in Bucks County rather than in Philadelphia" testified that the report had been "editorialized" by the front office (428a).

The newspaper articles show an attempt to dramatize the crime and the trial, obviously to prejudice the readers against these youths. The characterization of the four defendants as "bandits", "thugs", "holdup men", "all Philadelphians", "gunmen" time and time again in the newspaper article does not reflect factual reporting. The reference to Kelly as "a popular citizen" (Rel. Ex. 21; 972a), and as a "highly respected citizen" (Rel. Ex. 63; 1032a) was not factual reporting but obviously an attempt to prejudice the readers against these defendants. The statement that the defendants "morally killed three men" (Rel. Ex. 72; 1055a) is not factual reporting, but was obviously an attempt to prejudice the readers. The reference to the defendants' "sensational 30 day crime spree * * * during which seven persons (were) shot (and) (1) murdered and 9 places held up by 4" (Rel. Exs. 72 and 73; 1056a, 1059a) is not factual, but an attempt to prejudice the readers. The reference to the defendants as "callous" and "gangsters" and "gun toters" (Rel. Ex. 20; 970a) is at most overdramatized reporting and effective propaganda.

The following dramatic descriptive words are found in the newspaper accounts of the crime and trials: "quartet of

armed bandits", "shot three men" (Rel. Ex. 12; 953a); use of the word "bandits" 15 times and the word "thugs" 5 times in one article (Rel. Ex. 13; 955a-958a); "all Philadelphians" (Rel. Ex. 14; 959a); "gunmen", "holdups" "shoot it out" "bandits" (Rel. Exs. 14-15; 959a-963a); "four way murder case", "young Philadelphians", "bandits", (Rel. Exs. 16-17; 964a-966a); "bandits" "Philadelphians" "wild chase", "shot their way out" (Rel. Exs. 18-19; 967a-969a); "potential killers", "callous shooting", "trigger happy bandits", etc. (Rel. Ex. 20; 970a); "thugs", "trigger-happy bandits" (Rel. Ex. 21; 972a); "hardboiled", "wise cracking", etc. (Rel. Ex. 65; 1038a); "morally killed three men", "callousness", "outrageous" "escapade" "sensational 30 day crime spree" (Rel. Exs. 72-73; 1055a-1056a); "bravado", "killers", "Philadelphians" (Rel. Ex. 78; 1068a). The foregoing are only a few examples of the non-factual and overdramatic descriptive words used by the newspaper in reporting the crime in the Foster-Zeitz trial.

Likewise the editorials showed the newspaper policy designed to secure the death penalty for these defendants (Rel. Exs. 20, 22, 31, 42, 48, 49, 84, 90, 105; 970a, 974a, 982a, 998a, 1003a, 1005a, 1086a, 1093a, 1103a). An examination of the editorials discloses that the newspapers criticized the leniency exercised by jurors and even condoned *mob law*. None of the editorials even leaves to the juror's discretion the determination of the guilt or innocence of a defendant or the penalty to be fixed.

The following entitled editorials demand convictions and the stiffest penalties, irrespective of the evidence and the applicable law in each case:

"FAST POLICE WORK" (970a-971a);
"ERRORS OF JURORS" (974a-975a);
"WHO'LL BE THE NEXT?" (982a-983a);
"TIME FOR AN EXAMPLE" (998a);

"JURORS REBUKED AGAIN" (1005a-1006a); and "RAUS MIT 'EM" (1103a-1104a).

Further proof that the newspaper reports of the crime and the Foster-Zeitz trial were not true and accurate but were inflammatory and prejudicial is seen in the Intelligencer issue of Thursday, June 3, 1948 (Rel. Exs. 72-73; 1056a-1061a). There, in a frontpage article headed "Defense in Murder Trial Decides Not to Offer Evidence," it is stated that:

> "Seven persons were shot, one was murdered and nine places were held up by the four accused Philadelphians, according to the statements submitted in evidence in court yesterday, and signed by Zietz, Foster, Darcy and Capone."

This article is incorrect inasmuch as it is uncontradicted that Darcy did not participate and was not involved in four of such holdups. The confessions admitted in evidence in the Foster-Zeitz trial clearly show that Darcy was not a participant. Only three of the seven confessions were received at the relator's trial and upon objection by defense counsel that part pertaining to one holdup, in which the relator was not involved, was excluded with cautionary instructions. (See Opinion Denying Petition, Footnotes 15 and 16 (1203a-1204a).)

This example of incorrect newspaper reporting recalls a similar occurrence in *Shepherd vs. Florida*, supra. There newspaper men testified that the sheriff told them that petitioners had confessed and that they published this fact in their newspapers. The alleged confessions were not introduced in evidence, but, as here, news of the alleged confessions was widely published. This Court sharply criticized such unrepudiated newspaper reporting. In the instant case, 89% of the jurors examined and asked the question

testified that they had read of the case in the newspapers. Certainly, there is nothing on the record to show that the grossly false statement in said article had ever been corrected.

The atmosphere of prejudice and hysteria demanding execution of the death penalty for the relator existing at the time of his trial continues to the present date as evidenced by the recent newspaper articles in the Philadelphia newspapers. These articles are corroboration of such prejudice, according to Mr. Justice Holmes' Opinion, in *Moore vs. Dempsey*, 261 U. S. 86, 90, 43 Supreme Court 265, 266, that

> "The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor about a year later earnestly urging him not to interfere with the execution of the petitioners."

It is further uncontradicted that the foregoing newspaper campaign resulted in widespread antagonism against petitioner in Bucks County. Public prejudice against the defendants grew in such intensity from the date of the holdup that it amounted to an atmosphere of hysteria and prejudice reaching its climax at the Darcy trial. Relator called the following seven witnesses who testified that the general feeling in Bucks County against these defendants was that they "should have no leniency", "ought to be hanged", "ought to be shot", "stamped out like bugs", "they ought to get the chair", "should burn", "they should be given Bucks County justice", "lynched", "see them taken out and shot", "like to see them strung up", "don't deserve a trial", "they haven't got a chance in Doylestown because they hate Philadelphia boys and they were very bitter": Rev. A. Damrosch, of St. Pauls Episcopal Church, Doylestown (130a-131a); Rev. Babinsky, of the Dutch Reformed Church of America, Feasterville (160a-166a); Coe Farrier,

an Attorney (187a, 188a, 202a, 206a); Dr. Carl J. Hoffman (257a-260a, 267a); Howard Price (317a-319a); Knickerbocker Davis (436a-437a); Mrs. Inez Darcy Heckman, Darcy's sister (587a-589a); and Miss Alice Patterson (Zeitz' aunt) (394a).

Darcy's trial commenced on June 7, 1948, in spite of the passion and prejudice that had been aroused against him by the tremendous amount of newspaper articles and editorials of an inflammatory character that reached a climax during the Foster-Zeitz trial.

B.

Darcy's Trial Was Rendered Unfair and the Severance Theretofore Granted Made Worthless by Being Suddenly Advanced to Start after End of Companions' Trial and after Trial Judge Therein Had Publicly Praised Jury for its Imposition of Death Penalties.

Darcy had been granted a separate trial pursuant to the Pennsylvania Act of March 31, 1860, P. L. 427, 19 P. S., 785. The rationale for such severance was that he should be fairly tried in a public tribunal free of "prejudice, passion, hysteria and tyrannical power".

The majority's findings that the situation "certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community * * *", (p. 82), is most significant on this score. The majority thereby recognizes that the severance theretofore granted Darcy was rendered worthless, when his trial was proceeded with only three days after that of Foster and Zeitz.

As stated by Biggs, Chief Judge, in his dissent:

"Under the circumstances a change of venue or a delay in putting Darcy on trial was requisite to fairness" (p. 101).

The only reason that can be attributed for the sudden rescheduling of the Darcy trial is that the Bucks County Court, during the Foster-Zeitz trial, came to the conclusion that public prejudice against all defendants was such that death penalties could be secured. The overwhelming weight of evidence is that Darcy's case was originally scheduled for the term following the Foster-Zeitz trial, and then was suddenly advanced to follow immediately thereafter. The newspaper reports of the prospective dates of the respective trials was never repudiated by the District attorney's office. All newspaper reports prior to June 4, 1948 are consistent in stating that the cases of relator and Capone would be tried at a later term of court (Rel. Ex. 51; 1007a; Rel. Ex. 55; 1009a; Rel. Ex. 64; 1034a; Rel. Ex. 65; 1038a; Rel. Ex. 70; 1049a).

It is most significant that the *first date* that the newspapers reported the Darcy trial was to start immediately after the close of the Foster-Zeitz trial was in the Intelligencer issue of Friday, June 4, 1948 (Rel. Ex. 76; 1066a). It is only natural to infer that the only reason for the change in plans was that the District Attorney's office on Friday, June 4, 1948 was convinced that it had the Bucks Countians in a convicting and "electric chair" frame of mind, and that it would be expedient to dispose of the Darcy case at once, before the atmosphere of hysteria and prejudice and public indignation died.

Another reason for the sudden rescheduling of petitioner's trial is that the District Attorney's office knew that the jury panel, from which petitioner's jury was to be selected, had been present in the courthouse during the Foster-Zeitz trial and, therefore, had the opportunity to listen to or hear

of the details of the Feasterville holdup. The Bucks County Criminal Court records clearly show that on June 1, 1948 the traverse jurors summoned to appear on that date: "All answered to their names but the following * * *" and then there are listed the names of 40 jurors who did not then answer for service (Rel. Ex. 10 (c) and (d) 948a-952a). It is admitted that talesman Slaughter was present during several sessions of the Foster-Zeitz trial (1143a-1144a).

The analysis of the voir dire examination of the jurors who served in relator's case and were asked the questions shows that 89% of those asked admitted that they had read pertinent newspaper articles, 50% of those asked admitted that they had discussed the case, and 30% of those asked, or *one out of every three*, admitted that they had fixed opinions and were excused by the trial judge because they had formed opinions which they could not change. This analysis shows an increase of 26% over the number of jurors in the Foster-Zeitz case who had been asked whether they had read pertinent newspaper articles and admitted that they had, a 10% increase over the number of Foster-Zeitz jurors who had been asked whether they had fixed opinions and admitted that they had.

This case falls within the evils of public prejudice and hysteria discussed in *Commonwealth vs. Karmendi*, 328 Pa. 321 (339). There, of the 39 prospective jurors on the regular panel, 11 were excused because they had formed opinions which they could not change. Of 41 talesmen who were examined before the jury was completed, 13 were excused for the same reason. Approximately one-third of the jurors called to try the defendant stood up in open court and said they had fixed opinions derived from reading the newspapers and hearing the case discussed which they could not and would not change. Justice Drew, commenting thereon, stated at page 339:

"The examination of the testimony taken on voir dire reveals a remarkable fixity of opinion; the crystallization of public sentiment is apparent."

In view of the pressure to try the Darcy case immediately after the Foster-Zeitz case had closed with the electric chair penalty, while the newspaper and radio publicity and public indignation were still fresh in the minds of Bucks Countians, there could be no question but that the verdict in the relator's case was a foregone conclusion and that he was already prejudged. All the circumstances leave but one inference; that is, when relator's trial started on Monday, June 7, the prevailing opinion in Bucks County was that "Darcy is guilty and he must receive the electric chair."

The majority's conclusion condemns appellant for his trial counsel's failure to move for change of venue or continuance, although in its previous per curiam opinion (203 F. 2d 407, 409) it had sustained the action of the District Court in denying the petition for habeas corpus based on the objection that Darcy was deprived of due process by reason of the lack of effective assistance of counsel.

Neither of the decisions cited by the court below as authority for its position that significance must be attached to the fact that at no time did relator ask for a change of venue is applicable: *Stroble v. California*, 343 U. S. 181 (1952); *United States v. Rosenberg* (C. A. 2), 200 F. 2d 666 (1953). First, as stated hereinbefore, relator was not permitted to explain that he himself had not waived the right to ask for a change of venue or for a continuance because the court below in its earlier decision (203 F. 2d 407, 409) had excluded any testimony showing the lack of effective assistance of counsel. Secondly, in the *Stroble* case more than two (2) months elapsed between the alleged inflammatory newspaper articles and the date of [redacted]

berg case there were no news items whatsoever concerning the pending prosecution between November 1950 and February 21, 1951, the date of the trial—a period of three (3) months.

In the Darcy case, the trial started only two (2) days after two (2) weeks continuous publication of inflammatory newspaper articles about the Foster-Zeitz trial, wherein Darcy's name was daily mentioned. In any event, as stated in the *Stroble* case (at 193-194), petitioner's failure to make such a motion was not dispositive of the issue here. Petitioner herein has shown how the publication of the news of the Foster-Zeitz trial for two (2) weeks immediately preceding his trial prejudiced the jury in arriving at their verdict. Clearly, newspaper accounts of his companions' trial rekindled public prejudice in his case and aroused to an even higher degree such prejudice in the community that petitioner's trial was "fatally infected" with an absence of "that fundamental fairness essential to the very concept of justice". *Lisenba vs. California*, 314 U. S. 219, 236.

Nevertheless, the majority herein have concluded that "The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions, * * *". In its opinion, the majority further commented as to relator's original counsel: "And he did not at any time ask for a change of venue * * *" (pp. 81, 82).

The Court's findings and conclusions, relative to the issue of effective assistance of counsel, are, to say the least, contradictory and inconsistent.

In its earlier opinion, the Court below excluded any proof in support of its contention as to lack of effective assistance

of counsel. Now, in attempting to justify their conclusion that relator received a fair and impartial trial, the majority state that the trial counsel "* * * was sufficiently satisfied with the responses of these veniremen * * * And he did not at any time ask for a change of venue" (p. 81).

It is submitted that the relator should not be penalized for his trial counsel's failure to request a change of venue or continuance and that the trial court sua sponte should have granted such change in time or place.

If, however, the failure of the relator's trial counsel to act becomes essential and controlling, then the relator should have been permitted to offer testimony in regard to such lack of effective assistance of counsel.

It is, therefore submitted that the trial of petitioner, starting in an atmosphere of prejudice and hysteria and started reaching its climax during the Foster-Zeitz trial was but a sham and a farce and constituted a denial of due process of law.

II.

The "extraordinary and unprecedented conduct" of Judge Boyer, a judge other than the trial judge in petitioner's trial, who acted as an "overseer judge" and judicial aid to the district attorney and was "known" by the jury as "hostile" to petitioner, deprived petitioner of a possible unprejudiced determination as to the penalty to be imposed—whether death or life—and, therefore, violated, the due process clause of the Fourteenth Amendment.

A.

The Recognition by the Majority of the Court below that Judge Boyer's Conduct Amounted to a "Rather Striking Manifestation of Extraordinary Interest in the Proceedings" and, also, that the Jury Identified him as "Hostile" to Darcy Established that Judge Boyer "Had Done Something Prejudicial" to Petitioner, Resulting in a Denial of Due Process.

Under Pennsylvania law, the jury fixes the penalty in first degree murder cases—death or life imprisonment (18 P. S., 4701).

Judge Boyer's extraordinary and unusual manifestation of interest and active partisan participation in petitioner's trial had a terrific impact on the jury's fixing Darcy's penalty at death, rather than at life imprisonment.

The majority opinion in the court below squarely recognizes the fact that Judge Boyer showed an extraordinary and unusual interest in Darcy's trial. The uncontradicted facts of Judge Boyer's presence and participation were so obvious that they could not be and were not overlooked by the majority.

Obviously, the reason for the indelible impression made upon the majority by Judge Boyer's role in this case was that it was most unusual and extraordinary for another judge to be so actively present—let alone participate—in a trial, in which he did not preside. Nowhere in the records has there been found another example of a "two-judge" bench in a criminal or civil trial.

If the fact of Judge Boyer's "extraordinary interest" in Darcy's case made such a lasting impression upon the majority as set forth in the Opinion, then the tremendous impact of his presence and participation must have made an even more effective impression upon the minds of the jurors in the Darcy case.

The effect of the impact of Judge Boyer's role in this case upon the jurors is that his hostile attitude against Darcy was the decisive force in the determination by the jurors of the only issue left to them under Judge Keller's charge—whether to impose imprisonment for life or death as the penalty in this first degree murder case, as provided under Pennsylvania law (18 P. S., §4701).

Judge Boyer's conduct in the Darcy trial is most ably analyzed by Kalodner, Circuit Judge, in his dissenting opinion (pp. 85-101).

The majority has, at least by inference, recognized that Judge Boyer's conduct during the Darcy trial was a "dubious occurrence" in State procedure which they would proscribe if it should have happened in a Federal Court.

However, this is not the test as to whether or not there has been a violation of the due process guarantee, as set forth in *Betts vs. Brady*, 316 U. S. 455 (1942), *Johnson v. Zerbst*, 304 U. S. 458 (1938), and *Rochin v. California*, 342 U. S. 165, 172 (1952).

The test as stated in *Chambers v. Florida*, 309 U. S. 227 (1940) is:

"* * * No man's life, liberty or property, (can) be forfeited as criminal punishment * * * until there has been a charge fairly made and fairly tried in a public tribunal *free* of prejudice, passion, excitement and *tyrannical power* (pp. 236-237)."

Upon consideration of the "totality of facts", evidenced by the majority's admitted factual findings as to Judge Boyer's conduct in the Darcy trial, it is obvious that the relator's trial was offensive to the common and fundamental ideas of fairness and righteousness and that his conviction was in violation of the due process clause of the Fourteenth Amendment.

(a)

JUDGE BOYER'S PERSONAL FEELING OF PREJUDICE AGAINST RELATOR AND COMPANIONS.

Judge Boyer, by his conduct and by his statements in court, evinced a personal antagonism and indignation against the boys from Philadelphia who had made raids into Bucks County. The first expression of his sentiments is found in the Intelligencer issue of March 1, 1948, when both Judges expressed their objection to separate trials (Rel. Ex. 43; 1000a). This statement shows a deliberate attempt to hurry the trial of these homicide cases.

Thereafter, after the Foster-Zeitz jury returned its verdict of guilty of first degree murder, with the death penalty, the Intelligencer issue of June 5, 1948 (Rel. Ex. 78; 1071a-1072a), made the following frontpage quotation:

"JUDGE BOYER PRAISES JURY FOR VERDICT CONDEMNING 2 KILLERS TO THE ELECTRIC CHAIR."

He was reported as having told the Jury:

> "I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge these days.
>
> "The only hope of steeming the tide of such crimes by youths is to enforce the law, which you have indicated by your decision."

Apparently the jury's decision to impose the death penalty expressed Judge Boyer's personal sentiments against all the defendants. However, the public expression of such personal feelings by Judge Boyer, reported two days before Darcy's trial necessarily was circulated and broadcast throughout Bucks County.

During the very period in which Darcy was being tried, Judge Boyer in another case publicly expressed his antagonism against Philadelphians who came to Bucks County to commit crimes. In the Intelligencer issue of June 12, 1948 (Rel. Ex. 94; 1094a-1095a), there appears the following frontpage headline:

> "Judge Boyer Warns that Bucks County is Tired of Thieves from Phila." * * *

Judge Boyer was quoted as publicly stating:

> "Asserting that 'We don't propose to nail all our property fast here in Bucks county just because thieves from Philadelphia want to pick up everything which isn't being watched,' Judge Calvin S. Boyer, who sentenced an 18-year-old youth to prison yesterday, asked, 'What business did you have to come up here in the first place?'"

> "We in Bucks county are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it," Judge Boyer said," (1094a-1095a).

Bucks County is a small rural county in Pennsylvania. Its two principal newspapers, the Doylestown Daily Intelligencer and Bristol Courier, are jointly owned and controlled and, together with the Philadelphia newspapers, were circulated throughout the county. Judge Boyer's personal views and feelings were thus circulated and broadcast throughout Bucks County. It must be inferred that Bucks Countians were aware of Judge Boyer's personal feelings. After all, his feelings reflected the personal indignation of practically one out of every three adults in that county. Therefore, when Judge Boyer even appeared in the courtroom of Judge Keller during the relator's trial, it was ipso facto a constant reminder to all Bucks Countians, that Judge Boyer had publicly praised the Foster-Zeitz jury and had shown his expressed personal antagonism against Philadelphians who made criminal forays into Bucks County.

The majority of the court below recognized that under the circumstances existing at the end of the Foster-Zeitz trial:

> "The situation certainly would have justified a decision to wait awhile before trying the relator or else to try him in another community if trial immediately after the conviction of his confederates was deemed important * * *" (p. 82).

Three days later, Darcy was placed on trial in the same Bucks County Courthouse in spite of the fact that he had previously been granted a severance.

As stated by Judge Kalodner in his dissenting opinion: "It may be well at this point to avert to the factual findings which the majority made on the score of Judge Boyer's presence in the courtroom during Darcy's trial":

"Judge Boyer had just completed a trial at which relator's confederates had been convicted of first degree murder without recommendation of mercy and * * * he had commended the jury for its verdict."

"Honorable Calvin Boyer was much in and about the courtroom during the course of this trial * * *.

"* * * every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session.

"At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury, although there is nothing to suggest that the jury could hear what was being said.

"* * * at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling.

"* * * during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar * * *

"* * * the jurors knew Judge Boyer was. The evidence also makes it very probable that they also knew that he had just completed the trial at which relator's (Darcy's) codefendants had been convicted and sentenced to death. Moreover it had been reported in the press that Judge Boyer had commended the jury for the first degree verdict against the co-defendants with its mandatory death penalty."

There was a "rather striking manifestation of extraordinary interest in the (trial) proceedings" by Judge Boyer.

> It had come "to the jury's observation that a judge (Judge Boyer) other than the trial judge was showing much interest in the case" (pp. 88-89). (Emphasis supplied.)

The effect of Judge Boyer's presence and conduct in the Darcy trial, viewed in the light of the majority's factual findings, constituted a fundamental unfairness proscribed by the due process guarantee. Judge Boyer was well known in Bucks County; he had presided over the Foster-Zeitz trial; he had commended the Foster-Zeitz death verdict; he had publicly expressed his antagonism against outsiders (Robert White incident); and three days after the Foster-Zeitz verdict, when Darcy was placed on trial in the same Court, Judge Boyer was in attendance and participated as much as if he had been the trial judge. The undisputed fact that he was present and showed an "extraordinary interest" in the Darcy trial and that he had a hostile attitude towards "outsiders," necessarily effectively influenced and guided the jurors' imposition of the death sentence.

As stated by Judge Kalodner, Judge Boyer's presence and manifest interest of themselves raised a substantial due process question, principally because the jurors identified him as an official who was hostile to Darcy:

> "I believe that if the jurors identified Judge Boyer 'as an official who was hostile' to Darcy, such identification in and of itself raised a due process question which must be resolved in favor of Darcy, because a 'hostile' attitude of a judge can, and almost universally does, effectively influence and guide the jury's verdict."
>
> * * *
>
> "The United States Supreme Court, the Supreme Court of Pennsylvania and other appellate courts, have time and again emphasized the existence of this significant judge-jury relationship" (pp. 89-90).

See *Starr vs. United States*, 153 U. S. 614, 626 (1894); *Quercia vs. United States*, 289 U. S. 466, 470 (1933); *Commonwealth vs. Myma*, 278 Pa. 505, 508 (1924); *United States vs. Link* (C. A. 3), 202 F. 2d 592, 595 (1953); *United States vs. Brandt* (C. A. 2), 196 F. 2d 653, 656 (1952).

B.

Judge Boyer's Active Participation in Petitioner's Trial and, Particularly, His (a) Having Made a Ruling Therein, and (b) Having Passed a Note to the District Attorney During the Court's Charge Amounted to a Silent But Eloquent Extra-judicial Aid to the Prosecutor and "To Such Improper Partisan Participation by Judge Boyer in the Trial" as to Constitute a Denial of Due Process.

The record clearly shows that Judge Boyer actively participated in petitioner's trial. The majority opinion recognized that at times he joined Judge Keller on the bench for "whispered consultations within the view of the jury" and that "at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling." And that he, in effect and in fact, "sat" on the bench with Judge Keller during the course of the trial.

(a)

JUDGE BOYER DID ACTIVELY PARTICIPATE IN DARCY'S TRIAL WHEN HE ASSISTED IN RULING ON ADMISSION IN EVIDENCE.

During a side bar discussion out of the hearing of the jury shortly after court convened on Saturday morning, June 12,

a difficult question of law on the admissibility of evidence of other offenses in view of the Pennsylvania Act of July 3, 1947, P. L. 1239 (19 P. S. 711), arose. (1144a-1146a). This question was a very vital one, for, if the ruling were favorable to the Commonwealth, the jury would have for its consideration Darcy's written admissions of other holdups in which he had participated. With such confession before it, the Darcy jury would be more easily persuaded to dispense with any leniency toward the relator. As a matter of timing, the ruling on this evidence was also important, because the Commonwealth closed its case shortly thereafter. Judge Boyer's participation in the ruling, although out of the hearing of the jury, could not help but be noticed by the jurors. The District Court's finding that Judge Boyer left the bench shortly thereafter and did not return during the remainder of the trial is meaningless because the introduction of evidence ended shortly thereafter.

(b)

NOTE PASSING INCIDENT ESTABLISHES IMPROPER PARTICIPATION BY JUDGE BOYER IN THE DARCY TRIAL.

Miss Marian Ford, Joseph Darcy and Miss Margaret Gordon, witnesses called by the relator, had testified in substance that at the conclusion of his charge in the relator's case, Judge Keller had inquired of counsel whether he had omitted anything or if there were any corrections. They testified that Mr. Achey, defendant's counsel, indicated he had no objections or corrections and that Judge Keller thereupon proceeded to conclude his charge to the jury. Each of these witnesses testified that Mr. Biester, who was then seated next to Judge Boyer opposite the jury box, received a note from Judge Boyer, read it, stepped to the

front of the bench and interposed objections to the Court's Charge (481a-483a; 484a; 542a-544a; 631a-617a).

Excerpts from the Transcript of Trial of *Commonwealth vs. Darcy*, with reference to Judge Keller's charge and the objection of District Attorney Biester, appear in the Appendix at 1146a-1150a. The *time element* intervening between Judge Keller's request for corrections and suggestions and Mr. Biester's objection (1148a-1149a) corroborates the testimony of relator's three witnesses as to the passing of the note from Judge Boyer to Mr. Biester.

Mr. Biester claimed that he decided to make the objection "immediately after Judge Keller made his statement which I was not in accord with" (914a). The statement made by Judge Keller immediately before the objection was made had nothing to do with the subject matter of the objection. The subject matter of the objection (1148a) relative to the issue of flight—had been mentioned by Judge Keller long before the conclusion of his charge. Mr. Biester's objection was:

> "MR. BIESTER: Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree.
>
> THE COURT: I specifically stated it was completely abandoned in the case of flight or escape. That becomes important only, members of the jury, if you are convinced beyond a reasonable doubt, that this shooting of Kelly did not occur during the perpetration of a robbery."

The testimony of the respondents' witnesses in denial of the testimony of Miss Ford, Joseph Darcy, and Miss

Gordon, is equivocal and cannot constitute a contradiction thereof.

Mr. Biester testified that he had "*No recollection whatsoever*" that "during the charge a note was written and passed by Judge Boyer" to him (877a-878a). He did not specifically deny that such note was written and passed by Judge Boyer to him during Judge Keller's charge in relator's trial, although the present petition for writ of habeas corpus raising this very issue was filed in the District Court on April 3, 1951 and subsequently the subject of argument before the Court of Appeals. More than two years intervened between the date of the first argument before the court below and March 20, 1954 when he so testified that he had "no recollection whatsoever" (878a).

If the incident had not occurred Mr. Biester, who was District Attorney and is now a Judge, certainly knew enough about the rules of evidence to know that the note passing either occurred or did not occur. Later, he testified: "But I do not recall having received the note, or any relation between my arising and the reception of the note" (878a). See also cross-examination of Mr. Biester (911a-914a).

Mr. Curtin, then Assistant District Attorney, testified that he had "Absolutely no recollection of any note being handed to Judge—to District Attorney Biester at any time during the Charge of the Court" at the relator's trial (733a). He did not specifically deny that such a note was written and passed by Judge Boyer to Mr. Biester during Judge Keller's charge.

The majority recognizes that the note-passing incident would have been considered "such improper partisan participation by Judge Boyer in the trial," as to come within reach of the due process clause, had the incident been established by the evidence.

The majority's conclusion, with reference to this incident, is based upon an anomalous finding: that while "the Gov-

ment's showing (that it had not occurred) was less than overwhelming * * * yet it was not unsubstantial," and since "the District Court made a specific finding that this alleged occurrence did not take place * * * we think we are not justified in disturbing that finding" (p. 84).

As opposed to the direct testimony of three witnesses for Darcy that during Judge Keller's charge Judge Boyer sat in his "*special chair*" with Mr. Biester seated nearby, that Judge Boyer passed a note to Mr. Biester who *thereupon* arose and interposed an objection to a point in Judge Keller's charge, we have the "*no recollection*" *testimony of* Mr. Biester, the District Attorney (876a-878a, 884a) and of his assistant, Mr. Curtin (731a-733a, 739a).

It is submitted that where a man's life is at stake, as in the instant case, such "no recollection" testimony as given by Mr. Biester and Mr. Curtin cannot and should not be regarded as a "substantial" basis for a finding of fact such as was made by the District Court in this case. Certainly, trial attorneys with the experience of Mr. Biester and Mr. Curtin should have known whether such an incident had or had not occurred.

It is pointed out further that it is uncontradicted that the District Attorney and his assistant testified that, during Judge Keller's charge to the jury, *they had left their customary places at the Commonwealth table*, close to the bench and only four feet from the jury, and sat in chairs at the press table, which were on the opposite side of the courtroom some fifteen feet distant from the jury and some eight feet from Judge Boyer's "special chair." This admitted circumstance certainly corroborated the testimony of the relator's three witnesses as to this incident having occurred.

Further, again it must be pointed out that the objection raised to the Court's charge by Mr. Biester was one that an experienced trial attorney would have raised immediately upon Judge Keller's having asked for suggestions or correc-

tions at the close of his charge. The time element elapsing between Judge Keller's requests for corrections or suggestions and Mr. Biester's interposing his objection corroborated petitioner's contention that the matter was brought to Mr. Biester's attention by the note-passing to him by Judge Boyer.

Certainly, Judge Boyer's extraordinary and unprecedented conduct has never been duplicated in any other criminal trial in Pennsylvania Courts. It was and is not customary, in normal procedure in a Pennsylvania criminal trial, to have virtually a "*two-judge*" *bench*. Judge Boyer's presence and conduct had such a lasting and compelling impact and impression upon the jury as to take it out of the category of "state procedure" and to bring it within the protection of the due process guarantee of the Fourteenth Amendment.

As stated by Chief Judge Biggs in his dissenting opinion:

> "Judge Boyer's preoccupation with Darcy's trial was intense * * *. From his repeated visits to and his behavior in the courtroom, the members of the Darcy jury, with reason, could have inferred that he desired to indicate his belief and his desire that Darcy, like Foster and Zeitz, should be found guilty, and that the penalty of death should be imposed upon him by the jury: That such was the belief and the desire of the judicial authorities of Bucks County. Though in theory a judge does not control the decisions of juries, judicial attitudes have great influence on jurors. *Fairness cannot condone Judge Boyer's conduct*" (pp. 101, 102).

It is submitted, therefore, that Judge Boyer's presence and conduct in the Darcy trial was more than "a dubious occurrence". By no stretch of the imagination can his conduct be considered as fair. Indeed, it did amount to a denial of due process.

III.

CONCLUSION.

Although any one of the errors listed above requires the issuance of a writ of habeas corpus and the granting of a new trial, their multiplication certainly calls for a new trial to which the petitioner can obtain the protection of due process.

When a defendant is tried before a "two judge bench" by a district attorney assisted by the "overseer judge" on that bench, in a community inflamed by prejudice and passion, then such trial is, in the words of Mr. Justice Holmes, "a mask": *Moore vs. Dempsey*, 261 U. S. 86, 91. The outcome, under such circumstances, is inevitable.

WHEREFORE, it is respectfully submitted that the judgment of the court below should be reversed.

CHARLES J. MARGIOTTI,

J. DRESS PANNELL,

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August 12, 1955.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,564.

UNITED STATES OF AMERICA, ex rel.,
DAVID DARCY,

Appellant,

v.

EARL D. HANDY, Warden of Bucks County Prison, DR. FRED S. BALDI, Warden of the Western State Penitentiary, Rockview, and CARL H. FLECKENSTINE, United States Marshal for the Middle District of Pennsylvania.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Argued April 4, 1955.

Before: BIGGS, Chief Judge, and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

OPINION OF THE COURT.

(Filed June 9, 1955.)

By HASTIE, Circuit Judge.

In this habeas corpus proceeding the relator, a Pennsylvania state prisoner under sentence of death for murder, is contending that he was tried under such prejudicial circumstances and improper influences that it becomes the duty of a federal court to invalidate the state conviction as a denial of due process of law and to order a new trial.

The district court originally dismissed the petition without permitting relator to introduce evidence in support of his contentions. 97 F. Supp. 930. But on appeal this court ruled "that the relator must be afforded the opportunity to prove the allegations set out in his petition for habeas corpus insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at his trial; including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, since the undisputed and incontrovertible facts as shown by the record do not countervail the allegations of hysteria and prejudice." 203 F. 2d 409. Accordingly, the case was remanded to the district court for a full hearing on the indicated issues.

In compliance with our mandate the district court permitted the parties to make an elaborate showing of the circumstances under which the relator was tried in Bucks County, Pennsylvania, for felonious homicide in the commission of an armed robbery. Although the relator had been contesting his conviction for more than six years, this was the first opportunity given him to introduce evidence to establish facts not apparent on the face of the original trial record which, in his view, would make clear that the

trial was fundamentally unfair. In affording this opportunity, the district court devoted eight days to the testimony of more than thirty witnesses and the introduction of much documentary evidence. As a result, that court and this reviewing court now for the first time have been able to exercise fully informed judgment as to the essential fairness of the murder trial. It was specially important that this be done because there had been no taking of testimony on the relevant circumstances of the trial before any Pennsylvania state court in which the conduct of relator's trial had been challenged as essentially unfair. We emphasize this because we believe it is a virtue of our system of justice, as implemented by the due process clause of the Fourteenth Amendment, that it does not send a convicted person to his death without according him one full opportunity to prove charges of unfair trial which are not patently frivolous. The important thing here is that relator has now had that chance.

After full hearing and consideration of all of the evidence the district court was satisfied that relator's new proof was insufficient to establish that his trial had been fundamentally unfair. ——F. Supp——. We agree with that conclusion.

Relator has attempted to show that he was tried in a community so aroused against him that a fair trial was impossible, or at best so unlikely that a decent legal system must permit a second trial. Such a conclusion has been reached where the physical presence of a mob or a threat of mob violence has dominated a criminal trial. *Frank v. Mangum*, 1915, 237 U. S. 309; *Moore v. Dempsey*, 1923, 261 U. S. 86; *Powell v. Alabama*, 1932, 287 U. S. 45. But on the evidence adduced in the district court it is clear, as that court found, that relator's trial was conducted with dignity and decorum and without any hostile congregration or demonstration at or near the place of trial. Indeed, dur-

ing much of the trial the courtroom was not crowded. Certainly, the trial was not attended by any threat of violence or manifestation of mass hysteria. Moreover, a clear and elaborate showing was made to the district court that throughout relator's trial the jury was kept under strict guard, apart from other persons and without access to newspapers, radio, television or any other source of news or opinion.

However, the relator suggests that even though the jury was segregated and the community was outwardly calm during the trial, antagonism and hostility toward him were so great and widespread during the period immediately preceding the trial, that the probability of a prejudiced verdict from any jury of the vicinage was a greater risk than a society which insists upon equal justice under law can take. A combination of unchallenged facts has made it very difficult for the relator to establish such extreme and pervasive hostility. The record of the original trial, which is before the court in this collateral proceeding, shows that each of the prospective jurors was subjected to a searching *voir dire* examination. The questioning of the fourteen persons who became the jurors and alternates for this trial takes up some seventy pages of the typewritten record. Their responses indicated that they were capable of making and disposed to make a fair and objective evaluation of the evidence. Beyond that, original counsel for the relator was sufficiently satisfied with the responses of these veniremen so that he used less than half of the peremptory challenges available to him. And he did not at any time ask for a change of venue. Concerning the significance of this, see *Stroble v. California*, 1952, 343 U. S. 181, 194; *United States v. Rosenberg*, 2 Cir. 1953, 200 F. 2d 666, 669. While to a majority of this court these facts alone have not seemed so compelling as to preclude an independent showing that the trial was dominated by preju-

dice and hostility, they certainly make the undertaking very difficult. To meet this difficult burden of proof relator has relied largely upon the daily newspaper accounts and editorial comments published in the community during the trial of two of relator's alleged confederates, which ended only three days before he himself was required to stand trial. We have examined all of this material. The evidence does not indicate, as relator would infer, that the jurors who tried relator were waiting in or near the courtroom during the period of the trial of his confederates. At most it indicates that during the two weeks immediately preceding relator's trial the community in general had experienced a revival and quickening of interest in the homicide attended by many expressions of indignation against its perpetrators. But it does not appear that feeling ran so high or that hostility toward the relator was so intense and so general as to make it seem incredible that the search for a satisfactory jury would yield twelve persons as open minded about this case as the jurors here claimed to have been. The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions, yet not be convinced that failure to follow the wiser course was a denial of the essence of fair trial. The due process concept does not embrace all that a very careful and perceptive judge might do to protect a trial against emotional factors. It covers no more than the minimum protection which, consistent with our present ideas of justice, every court must afford. In this view of the reach of due process, we can not say that trial of relator at the time and place in question was a denial of constitutionally required protection.

Relator makes a second contention. Judge Hiram Keiler

presided over relator's trial. But another judge of the same court, Honorable Calvin Boyer, was much in and about the courtroom during the course of this trial. Judge Boyer had just completed a trial at which relator's confederates had been convicted of first degree murder without recommendation of mercy and, according to the press, he had commended the jury for its verdict. It is relator's contention that Judge Boyer's participation in and influence upon the trial were so unfair and prejudicial as to amount to a denial of due process of law. Here too the facts are now for the first time fully disclosed in the record. Relator's trial began June 7, and he was convicted June 14. There were daily morning and afternoon sessions. It now appears that every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session. At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury, although there is nothing to suggest that the jury could hear what was being said. It is also admitted that at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling. However, there is no claim that any erroneous or prejudicial ruling resulted from consultation between the presiding judge and his colleague. Finally, during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar and participants in the trial.

It seems to be agreed that the jurors knew who Judge Boyer was. The evidence makes it very probable that they also knew that he had just completed the trial at which relator's co-defendants had been convicted and sentenced to death. Moreover, it had been reported in the press that Judge Boyer had commended the jury for the first degree verdict against the co-defendants with its mandatory death penalty. Relator also makes the point that, while his trial

was in progress, the press quoted statements of Judge Boyer in another case reasonably calculated to indicate that the jurist was engaged in an effort to make it clear that the community would deal very sternly with wrongdoers from Philadelphia, a category which included the relator. But this last incident could not have affected the jury in relator's case, because the jurors had no access to any source of news. Nevertheless, relator argues that the overall effect of this situation was to make Judge Boyer's impressive record of attendance at this trial an intolerably coercive influence upon the trial jury. But we think this is attaching too much significance to the jury's observation that a judge other than the trial judge was showing much interest in the case. Certainly Judge Boyer was privileged to attend and observe proceedings of the court of which he was a judge. His presence in itself was not an impropriety. Even if the jurors identified him as an official who was hostile to the relator we think it would be necessary to show that he had said or done something prejudicial to the defendant during his stay in the courtroom before the fact of his presence and manifest interest could raise a substantial due process question.

The present petition charges one such act and this allegation has given us great concern. The relator alleged and attempted to prove that during the trial Judge Boyer actively helped the prosecutor. Specifically, there was testimony from witnesses who may well not have been unbiased that on one occasion Judge Boyer passed a written message to the prosecutor with the result that the prosecutor made a point to the presiding judge about an item in the charge. The government introduced evidence for the purpose of disproving this contention. The government's showing was less than overwhelming. Yet it was not unsubstantial. There was a sufficient conflict of testimony to make it necessary for the district court as the trier of facts in this

habeas corpus proceeding to resolve the factual question whether Judge Boyer did or did not coach and advise the prosecutor as alleged. The district court made a specific finding that this alleged occurrence did not take place. On the record we think that we are not justified in disturbing that finding. And absent some such improper partisan participation by Judge Boyer in the trial, we cannot say that his rather striking manifestation of extraordinary interest in the proceedings constituted a denial of due process of law. It is established constitutional doctrine that our limited function in correcting fundamental impropriety in state trials challenged under the due process clause makes it necessary that we leave alone many dubious occurrences in state procedure which we would proscribe if they should happen in a federal court. With *Betts v. Brady*, 1942, 316 U. S. 455, contrast *Johnson v. Zerbst*, 1938, 304 U. S. 453.

No other point urged by relator warrants appellate interference with the decision of the district court or requires particular comment.

The judgment will be affirmed.

KALODNER, Circuit Judge, dissenting

Under Pennsylvania law the jury fixes the penalty in first degree murder cases—imprisonment for life, or death.[1]

It is against the forefront of that grim and grave circumstance that Judge Boyer's conduct in the Darcy trial must be viewed, weighed and assessed and the issue determined whether Darcy was denied the due process guaran-

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[1] 18 P. S. §4701. "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict."

teed him by the Fourteenth Amendment. In doing so it must ever be kept in mind that "due process of law in the enforcement of a state's criminal law * * * expresses a demand for civilized standards of law" and "judicial review of that guaranty of the Fourteenth Amendment inescapably imposes * * * an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people *even toward those charged with the most heinous offenses*".[2] (emphasis supplied).

In my opinion the majority has failed to discern and assess the impact of Judge Boyer's conduct in the Darcy trial from the point of view at the minimum, of the jury's role in determining Darcy's fate—life or death.

I am of the opinion, too, that the majority erred in another important respect—in treating Judge Boyer's conduct as an "occurrence", albeit "dubious", "in state procedure", immune as such, from federal judicial remedial action.

Let us first consider the issue of Judge Boyer's role in the Darcy trial.

Bucks County, where Darcy was tried, at the time had a population of approximately 144,000—75 percent rural, 25 percent urban. Judge Boyer, then 72 years of age, was a native of Bucks County and had spent his entire life in the community. He had been a judge of the Bucks County Courts for some eighteen years. The extent to which he was known in the county is demonstrated by the fact that he had been its district attorney, twice by appointment and once by election, he had twice been elected for 10-year terms as judge (once in 1931 and again in 1941).

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[2] Concurring opinion of Mr. Justice Frankfurter in Malinski v. New York, 324 U. S. 401, 414, 416, 417 (1945).

Judge Boyer had presided at the trial of Darcy's two confederates which terminated Friday, June 4th with a verdict of guilty and the imposition of death sentences by the jury. Judge Boyer had complimented the jury on its action, stating: "*I don't see how you could*, under the evidence, *have reached any other verdict*. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. *The only hope of stemming the tide of such crime by youth is to impose the law which you have indicated by your decision.*", (emphasis supplied).[3]

Three days later, Darcy was placed on trial in the same court house in spite of the fact that he had previously been granted a "severance".[4] While I agree with the majority that this circumstance, standing alone, did not constitute denial of due process, it merits most serious consideration in evaluating the impact of Judge Boyer's conduct in the Darcy trial since the trial of the confederates had been

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[3] Quotation is from a first page article in the "Doylestown Daily Intelligencer" on Saturday morning June 5th carrying an account of the jury's verdict the preceding day. It was captioned "Judge Boyer Praises Jury For Verdict Condemning 2 Killers To Electric Chair". (Relator's Exhibit No. 78).

[4] Under Pennsylvania law "severances" are granted as a matter of absolute right when applied for by a defendant in a murder case. They are designed to grant the defendant a "separate" trial. It is interesting to note that the majority in noting that Darcy had been placed on trial only three days after conclusion of the trial of his confederates had this to say:

> "The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions, yet not be convinced that failure to follow the wiser course was a denial of the essence of a fair trial. The due process concept does not embrace all that a very careful and perceptive judge might do to protect a trial against emotional factors."

widely reported not only in the local newspapers and via radio but in nearby Philadelphia newspapers which had a considerable circulation in Bucks County.[5]

President Judge Hiram H. Keller of the Bucks County Court presided at Darcy's trial. He had, at the time, served some eighteen years as president judge.

It may be well at this point to advert to the factual findings which the majority made on the score of Judge Boyer's presence in the courtroom during Darcy's trial:

> *"Honorable Calvin Boyer was much in and about the courtroom during the course of this trial. . .*
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> *". . . every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session.*
>
> *"At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury* although there is nothing to suggest that the jury could hear what was being said.
>
> *". . . at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling.*
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> *". . . during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar . . .*
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> *". . . the jurors knew who Judge Boyer was. The evidence also makes it very probable that they also knew that he had just completed the trial at which relator's (Darcy's) codefendants had been convicted and sentenced to death. Moreover it had been reported in the press that Judge Boyer had commended the jury*

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[5] I imply no criticism of the newspaper, radio or television coverage of the trial of Darcy's confederates or his own, or of the events which preceded them.

for the first degree verdict against the codefendants with its mandatory death penalty."

There was a *"rather striking manifestation of extraordinary interest in the* (trial) *proceedings"* by Judge Boyer.

It had come *"to the jury's observation that a judge* (Judge Boyer), *other than the trial judge was showing much interest in the case."* (emphasis supplied)

Despite these significant and critical findings the majority concluded that Judge Boyer's presence and conduct in the Darcy trial fell short of the fundamental unfairness proscribed by the due process guarantee.

It went so far as to declare that *"Even if the jurors identified him* (Judge Boyer) *as an official who was hostile to the relator* (Darcy) that would not be enough; . . . it would be necessary to show that he (Judge Boyer) *had said or done something* prejudicial to the defendant during his stay in the courtroom *before the fact of his presence and manifest interest* could raise a substantial due process question."

I disagree with the majority's conclusion.

I believe that if the jurors identified Judge Boyer "as an official who was hostile" to Darcy such identification in and of itself raised a due process question which must be resolved in favor of Darcy, because a "hostile" attitude of a judge can, and almost universally does, effectively influence and guide a jury's verdict.

My opinion is based on intensive observation of juries during the ten years which I spent as presiding judge in the trial of criminal cases before I came to the appellate bench.

I know from first-hand experience how the members of a jury, consciously or subconsciously, are ever on the alert to glean from what a judge has said or done during the

course of a trial his opinion as to the guilt or innocence of a defendant. Jurors look, figuratively speaking, to every spoken word, to every nuance and inflection, to every gesture, no matter how slight or unintentional, to the extent and tenor of judicial participation in examination or cross-examination, to anything which could conceivably be construed as a straw in the wind as to the judicial "attitude".

The United States Supreme Court, the Supreme Court of Pennsylvania and other appellate courts, have time and again emphasized the existence of this significant judge-jury relationship.

"It is obvious that under any system of jury trials *the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.*" Star v. United States, 153 U. S. 614, 626 (1894); Quercia v. United States, 289 U.S. 466, 470 (1933)." (emphasis supplied).

The Supreme Court of Pennsylvania has similarly appraised the judge-jury relationship, stating, in the leading case of Commonwealth v. Myrna, 278 Pa. 505, 508 (1924): "The practice of a judge entering into the trial of a case as an advocate is emphatically disapproved. The *judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exceptions, looks for guidance*, and from whom the litigants expect absolute impartiality. *An expression indicative of favor or condemnation is quickly reflected in the jury box and at the counsel table.* To depart from the clear line of duty through questions, expressions or conduct, contravenes the orderly administration of justice. *It has a tendency to take from one of the parties the right to a fair and impartial trial, as*

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[6] We applied the principle stated in United States v. Link, 202 F 2d 592, 595 (1953).

guaranteed under our system of jurisprudence." To the same effect see Commonwealth v. Trunk, 311 Pa. 555, 566 (1933); Sorrentina v. Graziano, 341 Pa. 113, 119 (1941); Schlessinger Petition, 367 Pa. 476 (1951); Commonwealth v. Claiborne, 175 Pa. Sup. Ct. 42, 50 (1953)[1] (emphasis supplied).

Evidencing its insistence upon strict conformity with these expressed standards governing judicial office, the Supreme Court of Pennsylvania has held that their breach constitutes a deprivation of "due process".

It did so in DiBona, Adm'r v. Philadelphia Transportation Company, 356 Pa. 204, 216 (1947), stating: "Judges should never forget that 'the first and most essential element in a jury trial is a wise, learned, impartial and competent judge'. See Martin et al. v. Phila. Gardens, Inc., 348 Pa. 232, 236 . . . and Com. v. Brown, 309 Pa. 515, 521 . . . *A litigant who is denied this 'essential element' is deprived of 'due process of law'.*" (emphasis supplied).

It may be said that the foregoing is inapposite in the instant case because Judge Boyer was not the "presiding judge" at Darcy's trial. On that score it need only be pointed out, as the majority found, that Judge Boyer time and again "sat" on the bench with Judge Keller during the course of the trial and that he "at times . . . joined Judge Keller on the bench for whispered consultations within view of the jury" and further, "at least one such

[1] The United States Court of Appeals for the Second Circuit in United States v. Brandt, 196 F. 2d 653, 656 (1952), expressed a similar view with reference to the judge-jury relationship, stating: **"Because of his proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury or laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited toward a conviction he may privately think deserved or even required by the evidence."** (Emphasis supplied)

consultation was designed for the *guidance of Judge Keller in the making of a trial ruling.*" (emphasis supplied).

Coming now to the majority's statement that in the absence of proof that "Judge Boyer had said or done something prejudicial during his stay in the courtroom", there could be no finding of denial of due process:

In my opinion the record more than amply demonstrates that Judge Boyer "had done something prejudicial" to Darcy. The majority's own finding of his "rather striking manifestation of extraordinary interest in the proceedings" and its implicit recognition of the jury's identification of Judge Boyer as "hostile" establish that Judge Boyer "had done something prejudicial".

If more is needed the record supplies it.

The jury "knew" who Judge Boyer was. They "knew" he had presided at the trial of Darcy's confederates and they knew that he had praised the jury for finding them guilty and sentencing them to death.[8] They "knew" Judge Boyer "was showing much interest in the case". They "knew" the extent of his "interest" from the fact that he was in daily attendance at the trial and that "he even attended an evening session". They "knew" it from the fact of his "whispered consultations" with Judge Keller and they "know" it from the fact that he sat hours at a time, in a specially-placed chair on the front row, directly facing the jury and within its view.

Sitting there in that chair, staring the jury in the eye, as it were, Judge Boyer was to it an uncompromising watchful omnipresence; a stern sentinel of justice; an "overseer judge" over the jury itself, dedicated to the meting out of the fullest measure of penalty to the defendant; a silent but eloquent extra-judicial aid to the prosecuting attorney.

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[8] The voir dire examination of the jurors in the Darcy case disclosed that 89 percent of them had read the newspaper accounts of the trial of Darcy's confederates

I cannot conceive of a more striking example of judicial "guiding" of a jury's verdict—I refer particularly to the jury's imposition of the death sentence—than was so glaringly apparent in the instant case. It falls squarely within the reach of the prevailing rule proscribing undue judicial influence on a jury, and constituted fundamental unfairness violative of the due process clause. DiBona, Adm'r. v. Philadelphia Transportation Company, supra.

The duty of this court to give consideration to the "*totality of facts* in a given case" where the due process clause is invoked, was clearly spelled out by the Supreme Court of the United States in Betts v. Brady, 316 U.S. 455 (1942) (emphasis supplied).

> "The phrase (due process) formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial *is to be tested by an appraisal of the totality of facts in a given case.* (p. 462)
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> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is *offensive to the common and fundamental ideas of fairness and right* . . ." (p. 473) (emphasis supplied)

Again, in Johnson v. Zerbst, 304 U.S. 458 (1938). The Supreme Court said (pp. 465-66):

> "True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of *habeas corpus* cannot be used as a writ of error'. *These principles, however, must be construed and applied so as to preserve*

—*not destroy—constitutional safeguards of human life and liberty.* The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment." (emphasis supplied).[2]

I come now to the alleged note-passing incident which the majority indicated it would have considered "such improper partisan participation by Judge Boyer in the trial" as to come within the reach of the due process clause had it been established by the evidence.

I have deferred discussion of this phase of the case because of my view that independent of the note-passing incident the record sufficiently disclosed that Judge Boyer had "done something" prejudicial in violation of the due process guarantee.

The sum total of the majority's view with reference to the note-passing incident is that while "the government's showing (that it had not occurred) was less than overwhelming . . . yet it was not unsubstantial" and since "the district court made a specific finding that this alleged occurrence did not take place . . . we think we are not justified in disturbing the finding."

I disagree with the majority.

Three witnesses for Darcy testified that *during* Judge Keller's charge Judge Boyer sat in his "special chair" with the district attorney seated nearby; that Judge Boyer passed a note to the district attorney and the latter thereupon arose and addressed Judge Keller with respect to a point in his charge.

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[2] "As applied to a criminal trial **denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.** In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." Lisenba v. California, 314 U. S. 219, 236 (1941). (Emphasis supplied.)

The district attorney [10] and his assistant [11] testified that

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[10] Testimony of District Attorney Biester—N. T. pp. 888-89:

"Q. Do you recall—strike that. During the charge of the Court will you tell us, please, what you recall of the charge so far as your location in the courtroom is concerned?

"A. My best recollection is that when the charge began, or very early in the charge, Mr. Curtin and I retired to the seats which are in front of the table nearest to the right of the sitting Court.

"Q. Is that the table which has been identified by some persons as being a press table?

"A. I heard Mr. Curtin refer to it in language that might be assumed to be a press table. That is the table I am referring to.

* * * * * * * * * * * *

"Q. And were you seated there with any other person?

"A. Mr. Curtin was there with me. I, of course, don't recall whether we were there for every moment of the charge, but my recollection is that we were there for a major part of the charge.

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"Q. Do you have any recollection of Judge Boyer being present in the courtroom during any portion of the charge?

"A. I have not.

* * * * * * * * * * * *

"Q. There has been testimony to the effect that during the charge a note was written and passed by Judge Boyer to you. Now, do you have any recollection of any such incident?

"A. No recollection whatsoever."

[11] Testimony of Assistant District Attorney Curtin—N. T. pp. 713-14-15, 21:

"Q. How far was the Commonwealth's table from the nearest juror?

"A. The front of the Commonwealth's table would be about four to five feet from the front of the nearest juror—the front of the chair of the nearest juror.

"Q. And how far was it from the Commonwealth's table to the—strike that. Was there a table to the rear of the Commonwealth's table?

"A. There was.

"Q. And what was the purpose of that table?

"A. That was a table where the reporters constantly sat and where they were seated during this trial when they were there.

* * * * * * * * * * * *

"Q. Can you give us any estimate of the distance between the Commonwealth's table and the table which, I believe, you have referred to as being used by members of the press?

"A. I would say there was at least fifteen feet separating those two tables.

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during the course of Judge Keller's charge they did not sit at their customary places at the Commonwealth's counsel table which was about four feet or so from the jury, but instead sat at the press table some 15 feet distant (on the opposite side of the room); the chairs in which they sat at the press table were some eight feet or so away from the "special chair" reserved for Judge Boyer's use; they had "no recollection" whether Judge Boyer was at the time seated in his chair; they had "no recollection" whether Judge Boyer had passed a note to the district attorney as testified to by the relator's witnesses.

"Q. Now, Mr. Curtin, do you recall where Mr. Biester was seated during the charge of the Court?

"A. To the best of my recollection, sir, both Mr. Biester and I were seated in two of the chairs in the first of the two rows of chairs which were immediately in front of the reporters' table.

* * * * * * * * * * * *

"Q. Do you recall whether there was anyone sitting at the Commonwealth's table during the charge of the Court?

"A. I believe that I went to it for a few minutes but, to the best of my recollection, the Commonwealth's table had no one seated at it during most of Judge Keller's charge.

"Q. Do you recall seeing Judge Boyer in the courtroom during the Court's charge?

"A. I have no recollection whatsoever of Judge Boyer being in the courtroom during the charge of Judge Keller.

"Q. Do you have any recollection of any note having been handed by Judge Boyer to Mr. Biester at any time during the charge of the Court?

"A. I have absolutely no recollection of any note being handed to Judge—to District Attorney Biester at any time during the charge of the Court.

* * * * * * * * * * * *

"Q. Now what you called the reporters' table, is that the one that is between your table and the body of the courtroom?

"A. No, you are pointing to the defendant's table there.

"Q. Defendant's table, all right. Then the reporters' table was here—you said some distance—I think you said about eight feet from the chair marked 'Judge Boyer'?

"A. About eight feet from the front of the chair marked 'Judge Boyer' to the back of the chair behind the reporters' table; eight or ten feet."

The district attorney also testified that he had "no recollection" as to whether Judge Boyer had "assisted him" in the Darcy trial.[12]

It was on the basis of this "no recollection" testimony that the District Court Judge made the factual finding that the note-passing incident had *not* occurred and that Judge Boyer had not at any time assisted the district attorney.

In my opinion, in a case where a man's very life is at stake, *non-negating* testimony such as was given by the district attorney and his assistant cannot be regarded as affording "substantial" basis for a fact-finding such as was made by the District Court in the instant case.[13]

One cannot simply shrug off with a "no recollection" statement affirmative testimony of such an extraordinary event as the passing of a note by a judge to a prosecuting attorney in a murder trial.

Note-passing by a judge, to a district attorney, can scarcely be regarded as a casual, routine, every-day, run-of-the-mine occurrence. The implication of such an occurrence could scarcely escape an experienced prosecuting attorney and the event would have been indelibly inscribed upon his memory. But curiously here the district attorney had "no recollection" as to whether *it had happened or had not happened.* And even more curiously, lightning

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[12] N. T. p. 896:

"Q. At any time during the Darcy trial did Judge Boyer assist you in any way in the presentation of the evidence in the trial of the case?

"A. I have no recollection of such a situation at all, Mr. Van Artsdalen."

[13] The testimony disclosed that it was Zeitz, one of Darcy's confederates who had killed the deceased by one of two bullets which he fired in the course of their "get-away" from the scene of the hold-up; that Darcy had not fired his gun at the time. Darcy then was 22 years old. These facts, it is urged, might have been taken into consideration by the jury—at least to the extent of imposing a life sentence—had it not been "coerced" by Judge Boyer.

seems to have struck twice, because the assistant district attorney who was admittedly sitting by his side also has "no recollection" whether *it had happened or had not happened.*

It seems to me that the thread of a man's life, no matter how "heinous" his crime, should not be snapped asunder by the erratic, dulled blade of "no recollection".

My resolution in this respect is reinforced by the admitted but unexplained circumstance that the district attorney and his assistant, when the trial judge began his charge to the jury, saw fit to leave their customary places at the Commonwealth table, close to the bench and only four feet from the jury, and to seat themselves some 15 feet away at the press table, which, as they said, was some eight feet from "Judge Boyer's chair".

In conclusion I will dwell but briefly with the majority's view that Judge Boyer's conduct was an "occurrence—in state procedure", immune, as such, from the reach of the due process guarantee. Implicit in the majority's discussion on this score [14] is its recognition that Judge Boyer's conduct was "dubious" and its indication that it would have "proscribed" it had it happened in a trial in a federal court and would have considered it as a compelling basis for granting a new trial.

Shaken down to its hard core the majority's position —bluntly stated—is this: Darcy was grievously hurt by Judge Boyer's conduct but we cannot help him because he was hurt on the other (the State) side of the street; otherwise stated, there is no constitutional redress for Darcy despite the fact that he was unfairly tried because it was

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[14] "It is established constitutional doctrine that our limited function in correcting fundamental impropriety in state trials challenged under the due process clause makes it necessary that we leave alone many dubious occurrences in state procedure which we would proscribe if they should happen in a federal court."

his fate to be tried in a State court instead of a Federal court.

I do not agree.

I cannot draw as fine a line as the majority has drawn when the terminus of that line is death.

The mere circumstance that what happened to Darcy occurred in a State and not in a Federal court cannot operate to deprive him of his constitutional rights.

Judge Boyer's extraordinary and unprecedented conduct was totally foreign in every respect to the normal procedural course of a criminal trial in the Pennsylvania courts. It was not in any sense within the periphery of what may be described as the customary and normal procedure in Pennsylvania criminal trials. Its significance in its compelling impact upon the jury was of such proportion and vitality as to take it out of the category of "state procedure".

It is not incidental to any accepted standard of state procedure for a judge to conduct himself as Judge Boyer did in the Darcy trial. It is not incidental in Pennsylvania for a judge who has just completed a trial of a defendant's confederates and praised the jury which found them guilty and fixed death as their penalty, to participate, as Judge Boyer did, in the trial of a third confederate, presided over by the president judge of his court. It is not incidental for a judge to have a "special chair" placed for his use on the front row of the courtroom where he is in full view of the jury and it is within his full view and for him to sit there as an extra-curricular judicial overseer.

And it is not incidental in Pennsylvania criminal trials for a judge "to pass a note" to the district attorney.

In my opinion it can fairly be said of Judge Boyer's conduct that "This is conduct that shocks the conscience" in violation of the due process guarantee.[15]

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[15] Rochin v. California, 342 U. S. 165, 172 (1952).

Its inevitable effect was to distort the trial process to the extent at least that Darcy was deprived of a possible unprejudiced jury determination that justice required only the imposition of a life sentence instead of death.[16]

Of Judge Boyer's conduct it can also be said, as the Supreme Court of the United States said in Chambers v. Florida, 309 U. S. 227 (1940):

> ". . . no man's life, liberty or property (can) be forfeited as criminal punishment . . . until there has been a charge fairly made and *fairly tried* in a public tribunal *free of prejudice, passion, excitement and tyrannical power*". (pp. 236-37)
>
> * * * * * * * *
>
> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." (p. 241) (emphasis supplied).

Upon consideration of the "totality of facts", evidenced by the Darcy trial record, as directed by the Supreme Court of the United States in Betts v. Brady, supra, and applying the rule there stated that ". . . the Fourteenth Amendment prohibits the conviction . . . of one whose trial is offensive to the common and fundamental ideas of fairness and right"[17], I am of the opinion that the judgment

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[16] See Note 13.

[17] In Buchalter v. New York, 319 U. S. 427, 429 (1943) the late Mr. Justice Roberts stated the applicable rule as follows:

"The due process clause of the Fourteenth Amendment requires that action by a state . . . must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'."

To the same effect, see Rochin v. California, 342 U. S. 165, 169 (1952) wherein it was stated:

of the District Court should be reversed and the prayer of the relator granted.

McLaughlin, Circuit Judge, authorizes me to state that he concurs with the views expressed in the foregoing dissent.

BIGGS, Chief Judge, dissenting.

On reviewing the record in this case I cannot avoid an abiding conviction that the judicial process under which Darcy was tried was so distorted by circumstances, both in and out of the courtroom, as to result in fundamental unfairness. The brutal crime committed by Darcy, Foster, Zeitz and Capone had angered the citizens of Bucks County. By editorials, news stories and comments the press prejudged Darcy's case and prejudiced the minds of the citizenry against him. I cannot believe that all members of the jury remained uninfluenced by these publications.

Though Darcy had been granted a separate trial pursuant to the Pennsylvania Act of March 31, 1860, 19 P.S. Pa. §75, the severance was rendered worthless when his trial was proceeded with only three days after that of Foster and Zeitz. Under the circumstances a change of venue or a delay in putting Darcy on trial was requisite to fairness.

Judge Boyer's preoccupation with Darcy's trial was intense. He had been on the bench for many years and was a man of great weight in the community. He had complimented the jury at the close of the trial of Foster and Zeitz

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"Due process is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', Snyder v. Mass., 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty', Palko v. Conn. 302 U. S. 319, 325."

for imposing the death penalty and this fact had been widely publicized immediately preceding the commencement of Darcy's trial. From his repeated visits to and his behavior in the courtroom the members of the Darcy jury, with reason, could have inferred that he desired to indicate his belief and his desire that Darcy, like Foster and Zeitz, should be found guilty and that the penalty of death should be imposed upon him by the jury: that such was the belief and the desire of the judicial authorities of Bucks County. Though in theory a judge does not control the decisions of juries, judicial attitudes have great influence on jurors. Fairness cannot condone Judge Boyer's conduct.

The foregoing amounts to a denial of due process. A writ of habeas corpus should issue in this case and Darcy should be granted a new trial. The grant of the writ will not prevent him from being tried again for he cannot successfully plead double jeopardy.

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IN THE

Supreme Court of the United States

October Term, 1955.

No. 323.

UNITED STATES OF AMERICA, ex rel., DAVID DARCY,
Petitioner,

vs.

EARL D. HANDY, Warden of Bucks County Prison, DR. FRED S. BALDI, Warden of the Western State Penitentiary, and CARL H. FLECKENSTINE, United States Marshal for the Middle District of Pennsylvania,
Respondents.

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1.

OPINIONS BELOW.

The opinion of the district court dismissing the petition for writ of habeas corpus without permitting petitioner to introduce evidence in support of his contentions is reported in 97 F. Supp. 930.

The opinion of the United States Court of Appeals for the Third Circuit, remanding the case to the district court for a full hearing on the issues of the alleged atmosphere of hysteria and prejudice prevailing at the petitioner's trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, is reported in 203 F. 2d 407.

The opinion of the district court denying the petition for writ of habeas corpus, (R. 1191a-1244a), after a hearing relating to the circumstances under which the petitioner was tried in Bucks County, Pennsylvania, for felonious homicide in the commission of an armed robbery, is reported in 130 F. Supp. 270.

The opinion of the United States Court of Appeals for the Third Circuit, affirming in a divided (4-3) decision, the decision of the district court is reported in 224 F. 2d 504.

The majority opinion rendered by Hastie, J., is reported in 224 F. 2d 504, 505-509, (R. 1245-1250). The dissenting opinion by Kalodner, J., concurred in by McLaughlin, J., is reported at 224 F. 2d 504, 509-516, (R. 1251-1265), and the dissenting opinion by Biggs, C. J., is reported at 224 F. 2d 504, 516-517, (R. 1265-1266).

The divided (4-3) order of the Court of Appeals (R. 1268) denying petition for rehearing is not reported.

JURISDICTION.

The petitioner was convicted of murder in the first degree, with penalty fixed at death; in the Court of Oyer and Terminer of Bucks County, Pennsylvania, after a jury trial, on June 14, 1948.

The judgment of the Court of Appeals was entered on June 9, 1955, (R. 1267). A petition for rehearing was denied by the Court of Appeals on July 11, 1955, (R. 1268). The Court of Appeals on July 11, 1955, entered an order staying the mandate in this case until August 15, 1955, to permit petitioner to make application to this Court for Writ of Certiorari, (R. 1268).

The petition for a writ of certiorari was filed on August 15, 1955. The petition was granted on October 24, 1955, (R. 1269). This Court extended until February 17, 1956, the time for filing petitioner's brief on the merits upon application made pursuant to Rule 34(2).

The jurisdiction of this Court is invoked upon 28 U. S. C. A. Section 1254(1).

3.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States.

Amendment XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Statutes.

The revised Judicial Code, 28 U. S. C. A. Section 2241.

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless —

* * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * *."

The revised Judicial Code, 28 U. S. C. A. Section 1254(1).

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

Pennsylvania Statutes.

The Act of June 24, 1939, P. L. 872, Section 701, 18 Purdon's Penna. Statutes Annotated, Section 4701:

"* * * Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict * * *."

The Act of March 31, 1860, P. L. 427, Section 40, 19 Purdon's Penna. Statutes Annotated, Section 785:

"* * * In all cases in which two or more persons are jointly indicted for any offense, it shall be in the discretion of the court to try them jointly or severally, except that in cases of felonious homicide, the parties charged shall have the right to demand separate trials. * * *."

4.

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals err in holding that petitioner in a habeas corpus proceeding, under sentence of death for murder, who claimed that he had been denied a fair trial in a state capital case because of the atmosphere of hysteria and prejudice prevailing at his trial and because of the interest, attendance and participation of an "overseer judge" in his case, had not been denied due process of law under the Fourteenth Amendment merely because there was no proof that the physical presence of a mob or a threat of mob violence dominated his trial, but where, however, there was the following proof of a more subtle, yet even more effective, type of domination of his trial by prejudice and hysteria; that, immediately following a hold-up murder in a small rural county, there was expressed public sentiment and prejudice against the four youths involved; that local newspapers carried inflammatory and prejudicial front-page reports of the crime of the "trigger-happy bandits" from Philadelphia and of their confession of this and other holdups, in four of which the petitioner was erroneously included as having been a participant; that newspaper editorials criticized leniency of juries in not imposing death penalties and condoned "mob law"; that, prior to the trial of his companions, public sentiment throughout the county was vociferous in condemning the bandits and in demanding the death penalties; that, daily during the two weeks of his companions' trial, the newspapers carried inflammatory front-page reports of the trial and of petitioner's role in this and other hold-ups, although in four of said hold-ups he was not involved; that local radio stations broadcasted

daily news of his companions' trial; that petitioner had originally been granted a separate trial, scheduled for the term of court following the trial of his companions; that, suddenly, at the end of his companions' trial, petitioner's trial was scheduled to start immediately after his companions' trial; that the jury panel, from which his jury was selected, appeared in court during his companions' trial and had the opportunity to listen thereto; that petitioner's trial started three days after his companions' trial ended, on the very first day of the first session of the Court immediately thereafter, while the newspaper and radio publicity were still fresh; that the voir dire examination of the petitioner's jury showed a marked increased fixity of opinion of prejudging of and prejudice against him; and that, during his trial, the trial judge in his companions' case, whom the jury "knew" as being hostile to petitioner and who had publicly voiced his indignation against these "outlanders", showed such an extraordinary interest in the proceedings by his excessive attendance and active participation thereat as to guide and influence the jury's verdict and imposition of the death sentence?

2. Did the Court of Appeals err in holding that the "extraordinary and unprecedented conduct" of a judge, other than the trial judge in the petitioner's case, was not so unfair and prejudicial as to amount to a denial of due process of law, where there was proof that said "overseer judge" had presided at the trial of petitioner's companions; that he had publicly praised that jury for having imposed the death penalties; that he was present every day, beginning with the very first session on the first day, and even attended an evening session, during the petitioner's trial and sat either on the bench with the trial judge or in a "special chair" at a prominent position facing the jury as a spectator in the court room; that at times he joined the trial judge

on the bench "for whispered consultations" within view of the jury; that during one such consultation he, rather than the trial judge, actually made a ruling on a vital evidentiary issue; that during the charge to the jury, he actively helped the prosecutor; that he was identified by the jurors as "an official who was hostile" to petitioner; and that such "rather striking manifestation of extraordinary interest" and participation effectively guided and influenced the jury's verdict, fixing the penalty at death rather than at life imprisonment?

5.

STATEMENT OF THE CASE.

I.

History.

Darcy, the petitioner, then 22 years old, and three companions, Foster, 23, Zeitz, 18, and Capone, 16, engaged on December 22, 1947, in the armed robbery of the Feasterville Tavern near Doylestown, Bucks County, Pennsylvania. While the four youths were fleeing in an automobile from the scene of the robbery, a bystander, Kelly, was shot and killed by Zeitz.

As a result of this homicide, the petitioner and his three companions were jointly indicted in the Court of Oyer and Terminer of Bucks County, Pennsylvania, at No. 37, February Sessions, 1948 for the murder of Kelly, growing out of armed robbery.

Petitioner requested and was granted severance. Capone pleaded guilty.

Foster and Zeitz, two of petitioner's companions in the robbery, were tried first on this charge, before a jury pre-

sided over by Judge Calvin S. Boyer. The trial started on Monday, May 24, 1948, and *ended on Friday, June* 4, 1948. The jury returned a verdict of first degree murder and, in the exercise of their discretion as authorized by Section 701, of the Penal Code of 1939, (18 Purdon's Penna. Statutes Annotated, Section 4701), fixed the penalty at death. The judgments and sentences were affirmed by the Supreme Court of Pennsylvania, and opinions are reported at 364 Pa. 288, 72 A. 2d 279 and 364 Pa. 294, 72 A. 2d 282.

The petitioner was placed on trial in the same court, before President Judge Hiram H. Keller and a jury on *Monday, June* 7, 1948, just three days after the convictions and sentences of Foster and Zeitz.

Petitioner's trial took place in a hostile and prejudicial atmosphere just 3 days after the conviction of the co-defendants of murder in the first degree with penalty fixed at death, and after widespread publicity had been given to the case almost continuously from the day of the crime and particularly during the two weeks' trial of said co-defendants and, also, after public prejudice had become intensified against the defendants and after widespread publicity had been given to Judge Boyer's praise of the jury and the death penalties in the Foster-Zeitz trial. On June 14, 1948, the petitioner was found guilty of murder in the first degree and in his case, also, the jury fixed the penalty at death.[1]

On April 3, 1951, the petition for writ of habeas corpus upon which this appeal is based was filed in the District Court (5a-16a). Insofar as applicable to the instant appeal[2]

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[1] A history of the proceedings subsequent to said conviction and sentence is found in **United States, ex rel., Darcy vs. Handy, et al.,** 203 F. 2d, 407, 410-411, 420-421.

[2] The petition also alleged that Darcy was deprived of the rights guaranteed to him by the Fourteenth Amendment by reason of the lack of effective assistance of counsel. The Court, in its Per Curiam Opinion, 203 F. 2d 407, sustained the action of the District Court in denying the petition for habeas corpus based on this allegation.

the petition alleged that he was in custody in violation of the Fourteenth Amendment of the United States Constitution (28 U. S. C. A., Section 2241), because: (1) the petitioner was tried in an atmosphere of hysteria and prejudice, since the newspapers in Bucks County by their detailed and inflammatory front-page accounts of the crime and of the Foster-Zeitz trial and by their editorial policy literally demanding the death chair for the petitioner and his companions, had rendered impossible the impaneling of a fair and impartial jury in the Darcy trial, the petitioner having been put to his trial almost immediately,—3 days,—after that of Foster and Zeitz, who had been found guilty of first degree murder with death penalty; and (2) that Judge Calvin S. Boyer, the judge at the earlier Foster-Zeitz trial, who had already demonstrated prejudice against all robbers and who had publicly praised the jury in the Foster-Zeitz case for having fixed the penalty at death for the petitioner's co-defendants, frequently visited in the courtroom, and even attended a night session, during the petitioner's trial and, particularly, frequently appeared on the bench, together with Judge Keller, during Darcy's trial and, on one occasion, while sitting with Judge Keller, made a comment adverse to Darcy on a critical issue of evidentiary law, and participated in the consideration of the ruling made immediately thereafter adverse to Darcy's position, (R. 7a-10a).

On April 11, 1951, the District Court dismissed the petition without permitting petitioner to introduce evidence in support of his contentions. The District Court filed an opinion reported sub nom. *United States v. Handy*, 97 F. Supp. 930. Petitioner immediately took an appeal to the United States Court of Appeals for the Third Circuit.

In a per curiam opinion filed March 24, 1953, the majority of the court, (Biggs, C. J., McLaughlin, Kalodner and Hastie, J. J.), remanded the case to the District Court on

the issue of alleged hysteria and prejudice prevailing at his trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial and alleged participation therein (203 F. 2d 407-419).[3]

The petitioner thereupon filed a petition for rehearing pursuant to Rule 33 of the Court of Appeals. The rehearing was denied on April 29, 1953. Petitioner then filed in this Court a petition for writ of certiorari. This application was denied on October 26, 1953 (346 U. S. 865).

After the case was remanded, a hearing was held, with the petitioner present, before Hon. John W. Murphy, District Judge, on March 11, 12, 13, 16-20, 1954. The petitioner called 22 witnesses and offered 137 exhibits. The respondent called 11 witnesses and offered 6 exhibits.

The District Court, after said hearing, entered on February 12, 1955, an order dismissing the petition for habeas corpus on the ground that it was satisfied that petitioner's proof was insufficient to establish that his trial had been fundamentally unfair, 130 F. Supp. 270, (R. 1191a-1244a).

The matter was argued before the Court of Appeals en banc on April 4, 1955. Thereafter, in a divided 4-3 opinion, the Court of Appeals affirmed the judgment dismissing the petition. The majority opinion was written by Hastie, Circuit Judge, concurred in by Maris, Goodrich, and Staley, Circuit Judges. A dissenting opinion was filed by Kalodner Circuit Judge, which was concurred in by McLaughlin, Circuit Judge. A separate dissenting opinion was filed by Biggs, Chief Judge, (224 F. 2d 504; R. 1245-1267).

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[3] The matter was first argued on January 7, 1952 before a "three judge division", composed of Biggs, Chief Justice, Kalodner, Circuit Judge, and Burns, District Judge. Due to the seriousness of the alleged charges in the petition, the matter was reargued on December 1, 1952, nearly 11 months later, before the Court of Appeals en banc.

II.

Statement of Facts.

The proof adduced by petitioner that he had been tried in an atmosphere of passion, prejudice and hysteria, abetted by the excessive interest and participation by Judge Calvin S. Boyer, who was not the trial judge in petitioner's case, all in contravention of the Fourteenth Amendment of the United States Constitution, was as follows:

A.

The Local Press, By Editorials, News Stories And Comments, Prejudged Darcy's Case and Dictated An Out-Of-Court Campaign To Assure his Receiving The Death Penalty.

(a)

Prejudicial Newspaper Articles and Editorials:

Prior to Foster-Zeitz Trial:

"The *crime* Darcy and his associates had committed was a *brutal and notorious one.* There is no doubt that great animosity was stirred in the minds of persons in the vicinage by reason of the armed robbery and the murder of Kelly and that feeling ran high." Biggs, C. J., 203 F. 2d 407, at 414, footnote 8.

Newspaper Articles:

Immediately following the crime on December 22, 1947, there was a tremendous amount of newspaper publicity of an inflammatory nature. The four leading newspapers of Bucks County—"The Doylestown Daily Intelligencer", the "Bristol Daily Courier", the "Newtown Enterprise" and the "Quakertown Free Press"—by their articles and editorials reported every detail of this passion-arousing crime and dictated an out-of-court campaign to prejudice the citizens of Bucks County against the defendants and to demand the death penalty for them. The coverage of these newspapers was widespread throughout all sections of Bucks County.[1]

The *out-of-court campaign* carried on by these newspapers—and, particularly, "The Doylestown Daily Intelligencer"—to dictate the death penalty for the petitioner, as well as for the other defendants, commenced immediately

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[1] The population of Bucks County during 1947 and 1948 was 107,715 (Rel. Ex. 124, Pa. Manual 1947-1948). The "Doylestown Daily Intelligencer", a daily newspaper, was located in Doylestown Borough, the County seat, (pop. 5262), having a circulation in 1948 of 5329, primarily in the center of the county—Doylestown, Newtown, and parts of Montgomery Valley, although it was widely distributed throughout the county. The "Bristol Daily Courier", a daily newspaper, was located in Bristol Borough, (pop. 11,895), having common ownership with the Doylestown Daily Intelligencer, and had an average circulation of 5,307, primarily in eastern and lower Bucks County and, particularly, in Morrisville, Penndel, Bristol Twp. and Bensalem Twp. During this period, the "Bristol Daily Courier" received its news coverage of the crime, as well as of both trials, from the "Doylestown Daily Intelligencer". The "Newtown Enterprise", a weekly newspaper, was located in Newtown Borough, (pop. 2,009), having a circulation in 1948 of 1,972, within a five mile radius of Newtown. The "Quakertown Free Press", a weekly newspaper, was located in Quakertown Borough (pop. 5,150), having a circulation of 5,000, principally within a 25 mile radius of Quakertown. (R. 392a; R. 208a, R. 239a, R. 279a, R. 383a, R. 385a-387a; R. 273a, R. 389a-390a).

following the holdup and murder, grew in intensity and reached its climax with the reporting of the Foster-Zeitz trial.

The reports of the crime were detailed, headlined, front-page articles immediately following the murder on December 22, 1947,[5] reports of the crime were featured in many of the Doylestown Daily Intelligencer issues during January, February, March and April down to the date of the beginning of the Foster-Zeitz trial,[6] and *grew in intensity during the Foster-Zeitz trial*, reaching its climax in the Doylestown Daily Intelligencer issue of Saturday, June 5, 1948.[7]

The newspaper articles were uniform in their characterization of the defendants as "bandits", "thugs", "trigger happy youths" and "Philadelphians". The articles were more than newspaper coverage of a crime; they were in the nature of crusades against these defendants and other "outlanders", who dared to come into Bucks County to commit crimes.

Articles, editorials and comments were published in said newspapers from December 23, 1947, to May 22, 1948, continuously reminding the public of Bucks County of the heinous nature of the crime:

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[5] **Pre-trial Foster-Zeitz and Darcy:** Doylestown Daily Intelligencer: December, (6 issues), Rel. Exs. 12 to 22 incl.; January , (4 issues), Rel. Exs. 23 to 29 incl.; February, (6 issues), Rel. Exs. 31 to 42 incl.; March 1 and 2, (2 issues), Rel. Exs. 43 to 45 incl.; April 2, 3, 17, (3 issues), Rel. Exs. 46 to 48 incl.; Newtown Enterprise, Rel. Exs. 107, 108, January 1, 1948, (R. 953a-974a; R. 976a-981a; R. 982a-998a; R. 999a; R. 1001a; R. 1106a; R. 1108a).

[6] **Pre-Foster-Zeitz Trial:** Doylestown Daily Intelligencer: May 7, 12, 14, 19, (4 issues), Rel. Exs. 49 to 54 incl. (R. 1005a, R. 1007a).

[7] **Foster-Zeitz Trial:** Doylestown Daily Intelligencer, May 24, 25, 26, 27, 28, 29, (6 issues), Rel. Exs. 55 to 66 incl.; June 1, 2, 3, 4, 5, (5 issues), Rel. Exs. 67 to 79 incl. (R. 1009a-1040a; R. 1044a-1074a).

The Intelligencer issue of *December* 24, 1947, (Rel. Ex. 14-15; R. 959a, R. 963a), under the heading "*Bandits Admit Shooting Five Persons in Holdups*" referred to the defendants as "*trigger happy*" youths, quoted the petitioner as "*boastful*" and mentioned that they were *involved in a series of tavern robberies in the Bucks and Philadelphia Counties area.*

The Intelligencer issue of *December* 26, 1947, (Rel. Exs. 16-17; R. 964a, R. 966a), under the heading "Murder Now Faces the Four Bandits", in a subheading referred to the fact that "Dead Man Was Shot on Outside of Feasterville Inn When Bandits Fled After Shooting Two Other Men *Callously* During the Holdup".[8]

The Intelligencer issue of *December* 27, 1947, (Rel. Exs. 18-19; R. 967a-969a) in another headlined frontpage article referred to the prosecution of the "*Philadelphia's Four Young 'trigger happy' bandits.*"

The Intelligencer issue of *December* 29, 1947, (Rel. Ex. 21; R. 972a-973a) in a headline frontpage article, under the heading "Murder Victim Funeral Held Last Saturday" referred to the murder of Kelly—a "*Popular Citizen of Trevose Area*" and again referred to the four defendants as "*trigger happy bandits.*"

The Newtown Enterprise weekly issue of January 1, 1948, (Rel. Exs. 107-108; R. 1106a-1110a), under the frontpage heading: "*Easy Xmas Money Was Bandits Aim*" referred to the "Four Philadelphia Bandits Who Shot Up Two Taprooms in Lower Bucks County."

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[8] Under sub-heading **"Feeling Runs High"** it is stated: "The general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the youthful bandits to trial, and that it is a **'break' for society** at large to have the trials in Bucks County rather than in Philadelphia (R. 965a, R. 966a).

Editorials:

Simultaneously with the coverage of the crime, there commenced in the Doylestown Daily Intelligencer *an editorial policy* designed to secure the electric chair for the youths involved in the Feasterville Inn holdup. Said editorial campaign started with the editorial, headed: "*Fast Police Work*" in the Intelligencer issue on *December* 27, 1947. (Rel. Ex. 20; R. 970a-971a)." This editorial especially condemned a Philadelphia jury, which had recently given the killer of two cops life imprisonment instead of the electric chair. Shortly thereafter another passion-arousing editorial headed "*Errors of Jurors*" appeared in the Intelligencer issue of *December* 31, 1947. (Rel. Ex. 22; R. 974a-975a). This editorial referred to "*Criticism of the Inefficiency of Jurors*"

FAST POLICE WORK

THE ROUNDINGUP of the young gunmen who robbed the Feasterville and Penndel cafes and admitted many other robberies, is something for which we can thank the police of the county and Philadelphia.

What the public and the police will be watching closely is what is done to these potential killers when they come before the bar of justice.

One of the victims of the **callous shootings** has since died.

Something else that is particularly worth while remembering is the statement of one of the witnesses that one of the **young gunmen** remarked that it was lucky that no State Police were on the scene, because they also would have been shot.

When we stop to consider the number of policemen who have been killed by **trigger-happy bandits,** it is not difficult to believe that the gangster meant what he said.

We have always wondered why the police so often take chances with wanted men who are known to be gun-toters and potential killers.

It is especially surprising in view of the miscarriage of justice in Philadelphia recently * * * when a jury predominantly made up of women, gave the killer of two cops life imprisonment instead of the electric chair, especially in view of the previous record of the killer (R. 970a, R. 971a).

and stressed that particularly in murder cases, "*juries frequently render verdicts that it is difficult to explain*". This editorial did not advise the reader that each case must be decided under the evidence and under the law.

The newspaper publicity of the offense did not diminish in its intensity within a week or two after the crime. Periodically, until almost preceding the Foster-Zeitz trial, there appeared reminders of the holdup and killing, as well as other holdups in which these youths had been involved, and also reminders of the danger of leniency in dealing with these defendants.

"The Gossiper" column in the Intelligencer issue of January 16, 1948, (Rel. Ex. 25, R. 979a), stressed that if "*Courts and jurors were to dispense with a lot of the sentimentality about criminals * * * the general public would not face so many horrible crimes as horrify newspaper readers daily.*"

An editorial in the Intelligencer issue of February 2, 1948, (Rel. Ex. 31; R. 982a-983a) headed "*Who'll Be the Next*" referred to the current gruesome story appearing in the metropolitan newspaper describing the brutal beatings of aged men and women in their shops by holdup men. The editorial stressed that "If juries and courts will make examples of these cowardly enemies of society there will be fewer of their assaults. * * * *It would be lamentable if citizens were forced to take the punishment of them into their own hands*" (R. 983a). (Italics supplied.)

The Intelligencer issue of February 6, 1948, (Rel. Exs. 34-35; R. 984a-988a) contained an article headed "*Less Power for Juries,*" under a Harrisburg dateline, and discussed a Philadelphia judge's "proposal to relieve juries of the power to fix penalties in cases involving first degree murder" on the ground that jurors "do not know how to exercise it" (R. 984a, R. 985a).

The Intelligencer issue of February 10, 1948, (Rel. Exs. 36-37; R. 989a-991a), under the heading "Four Youths In-

dicted for Feasterville Murder" again reported on the front page the passion-arousing details of the crime. The article referred to the precautions taken by the four State Troopers, the sheriff, two deputy sheriffs and county detectives to keep these "trigger happy bandits" in custody while being brought from the Bucks County Prison to the courthouse (R. 989a, R. 990a).

Almost simultaneously with the indictment there appeared in the Intelligencer issue of February 11, 1948, (Rel. Ex. 38; R. 992a-993a), an editorial designed to arouse the passions of the readers. The editorial entitled "*Enraged Citizens*" condemned leniency by courts and juries in dealing with criminals and stated that although "*Mob law* is not the kind we want in this country * * * but there probably were thousands of women, * * *, who felt like cheering when they read that" a convicted rapist, who had been merely fined $25.00 had been "*tarred and feathered.*"

The Intelligencer issue of February 16, 1948, (Rel. Exs. 40-41, R. 995a-997a), carried the frontpage headlined article "Police Connect Six Bandits Arrested Here to a Number of Robberies and Holdups" and in heavy type headlined that "They Also Know Members of the Boy Murder Gang."

Another frontpage article of the same issue, (Rel. Ex. 40; R. 994a), under the heading; "10 *Young Problems*" stressed that "Something to worry about in the way of Juvenile Delinquency has been furnished by ten Philadelphia boys now incarcerated in the Bucks County Prison," and that "Four of the Boys Are Charged With Murder."

Two days later in the Intelligencer issue of February 18, 1948, (Rel. Ex. 42; R. 998a), an editorial appeared, headed "*Time For an Example.*" It stated that "The Overflow of Philadelphia's Young Criminals Into Bucks County Might, It seems Reasonable to Believe, Be Discouraged if the Crooks were given Sentences which would be impressive and get Headlines Large Enough to be Seen and Become

Impressive. *Stiff Sentences have had that effect before.*

The Intelligencer issue of March 1, 1948, (Rel. Ex. 43; R. 999a-1000a), under the heading "Charged With Murder, Asks Separate Trials," quoted Judges Keller and Boyer as preferring "to have a combination trial if possible, covering all defendants" and as being critical of the petitioner's application for a separate trial on the ground that "separate trials in these cases will mean that it may take a year to dispose of the cases."

The Intelligencer issue of April 2, 1948, (Rel Ex. 46; R. 1001a-1002a), contains a reprint of an editorial of the Philadelphia Inquirer, entitled "*Mild Sentence For Murder*," showing an editorial policy against leniency in murder cases and against considering each case upon the facts and law thereof.

The most inflammatory editorial is that headed: "*If Sob Sisters Lay Off*" in the Intelligencer issue of April 17, 1948, (Rel. Ex. 48; R. 1003a-1004a). The editorial quoted Judge Harry McDevitt, of Philadelphia, as telling three holdup men, whom he had sentenced to from 10 to 30 years, that: "You wise guys start out with guns and usually wind up in the electric chair." The editorial commented that: "Unfortunately * * * there still are Judges and Pardon Boards not yet convinced that thugs of that type should not be given an early opportunity to prey on the public. It seems to be time to stop making guinea pigs of the lawabiding members of society."

The editorial policy against lenient sentences appears again in the Intelligencer issue of May 7, 1948, (Rel. Ex. 49; R. 1005a-1006a). In an editorial headed: "*Jurors Rebuked Again*," this editorial referred to a judge in Philadelphia having twice rebuked a jury for soft-hearted decisions. It further commented that:

> "It makes it more and more apparent that untrained men and women, not familiar with court rules or the

proper weighing of evidence are lacking in temperament or ability to serve efficiently."

During Foster-Zeitz Trial:

The trial of petitioner's two companions, Foster and Zeitz, started on Monday, May 24, 1948, and ended on Friday, June 4, 1948. This trial was highly publicized in the newspapers, which were distributed throughout Bucks County —all in headlined frontpage articles.

The Intelligencer each day carried detailed accounts of all phases of the case, from the voir dire examination of the jurors, to the almost verbatim testimony of each eye witness at the Feasterville Tavern holdup, to the almost verbatim demand for the death chair by the District Attorney in his closing summation.

The news coverage of the trial was more than fair comment on what transpired in the courtroom. The articles were dramatic and passion-arousing.

The Intelligencer issue of May 24, 1948, (Rel. Exs. 55-56; R. 1009a-1012a) carried the frontpage feature: "Feasterville Murder Case Defendants Go on Trial." Curiously, this article again reported: "Only two of the defendants charged with the murder will go on trial this term. * * * The other two defendants, David Darcy, 22, and Felix Capone, 16, will be tried at a later term of court." The article referred to Foster and Zeitz having been "* * * brought into court by two State Troopers * * * other guards and Sheriff's deputies were stationed nearby * * *."

The Intelligencer issue of Tuesday, May 25, 1948, (Rel. Exs. 57-58; R. 1013a-1017a), again gives a play by play description of the selection of the voir dire examination of the jurors, and the names of the jurors selected were boxed on the frontpage under the heading: "KELLY MURDER

JURY." This article also refers to the fact that: "Two other defendants will be tried for the same crime at a later term of court * * * David Darcy, 22, and Felix Capone, 46, also Philadelphians." It stated the defendants were charged with holdups in Philadelphia, Montgomery and Delaware Counties and in South Jersey, in one of which holdups a Philadelphia city fireman had been shot.

The same issue of the Intelligencer, (Rel. Ex. 57; R. 1018a), carried a frontpage article entitled: "*MERCY IS OVERDONE*," under a Washington dateline, quoting Mr. Justice Robert H. Jackson of having accused his Supreme Court colleagues of giving hardened criminals too many chances of getting out of jail.

The May 26, 1948, issue of the Intelligencer carried another headlined frontpage article (Rel. Exs. 59-60; R. 1019a-1023a), and the names and addresses of the jurors selected appear in heavy block type on the front page under the heading: "Zeitz-Foster Murder Jury." The article refers to the trial of "Two *Philadelphia* Youths Charged With the Murder of William Kelly." The article referred to Judge Boyer having issued a special venire of 50 jurors to be returned the following morning, the original panel having been exhausted.

The Thursday, May 27, 1948, issue of the Intelligencer, (Rel. Ex. 61; R. 1024a), contained a frontpage photograph headed "MURDER DEFENDANTS ON THE WAY TO COURT," with the notation: "Handcuffed to police are two Philadelphia youths on trial in the Bucks County Court House * * *." The photograph shows the defendants handcuffed to two state troopers, sheriff and deputy sheriff. The same issue, (Rel. Exs. 61-62; R. 1025a-1030a), carried the headlined frontpage story entitled: "128 Jurors Called in Murder Trial, But Only 11 Seated," and again carried a blocked list of the "ZEITZ-FOSTER MURDER JURY." The article referred to the fact that: "The fourth day of

the trial opened this morning shortly after 10 o'clock and still the case had not been opened to the jury by the Commonwealth * * *." Much was made of the exhaustion of the second venire of the jurors and of the necessity for calling a third venire.

The Friday, May 28, 1948, issue of the Intelligencer, (Rel. Exs. 63-64; R. 1031a-1037a), carried the headlined frontpage article entitled "JURORS VISIT MURDER SCENE, TESTIMONY IS UNDER WAY, LANDLORD IDENTIFIES THREE." The article refers to the "Trial of two members of a Philadelphia Boy-Bandit Gang that *killed a Trevose man, made a cripple out of another man for life*, and injured several others in a holdup at the Feasterville Inn last December 22." The article quotes District Attorney Biester as having "Left little doubt in the minds of those who heard him that when he makes his next speech to the jury the Commonwealth will ask for the death penalty." The article refers to Kelly (the deceased) as "a highly respected citizen of his home community. * * *." The article stated that: "It took exactly 147 jurors to get the 14 required for this trial. It took 17 hours of questioning. * * *." The article carried the names and detailed accounts of the testimony of the various witnesses. One witness, John R. Naysmith, a spectator at the holdup, was reported as testifying: "I saw Zeitz and Foster in front of the bar, I also saw David Darcy there." *Repeated references were made to the activities of Darcy during the holdup*, including "I heard Darcy ask where the hero was that hit me * * * 'Where are the police': I feel like shooting a couple of them", (R. 1031a; R. 1032a, R. 1033a, R. 1034a, R. 1035a, R. 1036a).

The May 29, 1948, issue of the Intelligencer, (Rel. Exs. 65-66; R. 1038a-1043a), carried the frontpage headline: "*Heard Feasterville Bandits Say They Would Also Like To Have Sho; 'Some Cops*" The article referred to:

"The horror of the Feasterville's Tavern Murder during last year's Christmas Season, when an innocent outsider was fatally shot, is being related in detail again today in Bucks County Criminal Court."

"The spectacle of a quartet of wise-cracking trigger happy young bandits who invaded the Feasterville Inn last December 22, at night, shooting down patrons *'just for the fun of it'* was described from the mouths of numerous Commonwealth witnesses all day yesterday."

The article referred to "Hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later." Again the detailed testimony of the Commonwealth witnesses was given as to the passion-arousing details of the crime, wherein *time and time again the name of Darcy and his conduct appeared, although Darcy was not then on trial.*

The Monday, June 1, 1948, issue of the Intelligencer, (Rel. Exs. 67-68; R. 1044a-1048a), in a frontpage article headlined: *"Why Did They Shoot Me? Murdered Man Asks After He Was Victim in Feasterville Shooting,"* starts with this passion-arousing paragraph: "Crippled for Life, a 46-year-old Philadelphian was wheeled into court this morning on an invalid chair." The article reported Hellerman as testifying that he "was playing shuffle board in a side room of the Inn when David Darcy, 22,—who will be tried later—came in and fired two shots." *Repeated references were made to Darcy's conduct during the shooting.* Hellerman is quoted as testifying "I have pain all of the time in my legs, I no longer have normal control of my organs. I can move my hands but not my legs."

The Tuesday, June 2, 1948, issue of the Intelligencer, (Rel. Exs. 70-71; R. 1048a-1054a), another frontpage article headed: "Zeitz Admits Firing Two Shots Out of Auto" starts "'You ought to try this some time * * * it's a lot of fun' a

16-year-old Philadelphia boy-bandit, remarked to patrons of Deacon's Inn near Penndel during a pre-Christmas holdup last December, less than 30 minutes after a holdup and murder at nearby Feasterville." The article referred to the "trigger happy bandits," "four Philadelphians," including "Darcy, * * * who will be tried later." The article stated: "Slowly, but carefully, the Commonwealth is leading up to the point when it will ask that the jury demand that Zeitz and Foster pay with their lives for the death of William Kelly." The article referred to Assistant District Attorney Curtin's having read an 8-page typewritten statement of all defendants to the jury. The statements mentioned that "All four defendants said everything in the statement was true." *The article further refers to other holdups committed by Darcy and his companions*, in one of which holdups he was referred to as having stated: "That he had just shot a couple of men at another place."

The Newtown Enterprise issue of June 3, 1948, (Rel. Exs. 109-110; R. 1111a-1116a), reported in a frontpage article the passion-arousing details of the crime under the headline: "Youths Escapade Ends in Murder." It referred to:

> "The sordid tale of thrill-seeking youths whose escapade ended in murder is in its second week in criminal court at Doylestown * * * of the hardboiled behavior of the gang that held up 18 patrons before the murder. Two others charged with the same offense will be tried later * * *."

This article, like the daily accounts in the Intelligencer, *stressed Darcy's roll in the holdup.*

The Thursday, June 3, 1948, issue of the Intelligencer, (Rel. Ex. 72; R. 1055a), in another frontpage article headed: "*Prosecutor's Plea*" quotes District Attorney Biester in his summation to the jury, as having declared:

> "*Morally*, these boys, Zeitz and Foster, *killed three men* the night of the Feasterville holdup" * * * "William Kelly was mortally wounded by a shot from the bandit gun, and the two others were horribly crippled, one for life", * * * "Even a surgeon's knife cannot restore one of the victims to normal life."

The District Attorney also emphasized the fact that the defendants' callousness was outrageous when the bandits wished the victims of a holdup, "a Merry Christmas" before leaving the Feasterville Inn shooting escapade:

> "Not satisfied with the Feasterville Affair, they went to another place the same night and held it up with guns. *What one did, was the attitude of all.*"

The same issue of the Intelligencer, (Rel. Exs. 72-73; R. 1056a-1061a), carried another frontpage article headed: "Defense in Murder Trial Decides Not To Offer Evidence." This article stated: "* * * Sensational 30-day crime spree that ended in a murder * * *." Later in the article it is stated: "Seven shootings, one a fatal affair, during a 30-day hold-up spree, were enumerated in court as the written documents were read by Assistant District Attorney Willard S. Curtin", (R. 1059a). The article stated that:

> "Seven persons were shot, one was murdered and nine places were held up by the four accused Philadelphians, according to the statements submitted in evidence in court yesterday, and signed by Zietz, Foster, Darcy and Capone."

This article is basically incorrect inasmuch as Darcy did not participate in four of the holdups and the statements submitted clearly so state.

The Friday, June 4, 1948, issue of the Intelligencer, (Rel. Exs. 75-76; R. 1062a-1066a), in a frontpage article headed

"FATE OF ZIETZ AND FOSTER IN JURY'S HANDS," referred to the defendants as two "trigger happy Philadelphia youths" and to the "brutal killing of William Kelly." The article gives excerpts of *Judge Boyer's charge* to the jury, *including a statement that "in his opinion the death penalty is warranted in this case."* Included in the excerpts of Mr. Biester's summation were his comments that these boys are *"not normal American boys,"* and that "they were as brazen as they could be during this trial and during their escapades of crime."

The Saturday, June 5, 1948, issue of the Intelligencer, (Rel. Ex. 78; R. 1071a-1072a), published and circulated—*two days before the petitioner's trial*—several front page articles. The featured article was headed:

> "JUDGE BOYER PRAISES JURY FOR VERDICT CONDEMNING 2 KILLERS TO ELECTRIC CHAIR. Court Tells Eight Men and Four Women He Could Not See How Any Other Course Could Have Been Taken —Two Defendants Appear To Be Unmoved."

Another frontpage article of this Saturday, June 5, 1948, issue was headed, "Two Young Killers Turn To Bible For Comfort", (Rel. Exs. 78-79; R. 1068a-1069a). This article referred to the convictions of Foster and Zeitz by a Bucks County Jury * * * *Who wasted no time on their deliberation* before returning a verdict of guilty of murder in the first degree with death penalty recommended." This article referred to the costs of the prosecution to the county.

Another frontpage article of said Saturday, June 5, 1948, issue, (Rel. Ex. 78; R. 1070a), was headed:

> "HELD FOR BURGLARY.
> 3 Youths Lived Near Zietz and Foster"

The article referred to the arrest of three Philadelphia youths, including Robert White, 18, and *merely referred to*

the fact that they lived in the vicinity of an inn that was held up by the two convicted murderers, who were sentenced to death here, the preceding day.

Finally, in the same issue of Saturday, June 5, 1948,—*two days before the petitioner's trial started*—under the column, "We Noticed", appeared two articles, (Rel. Ex. 79; R. 1074a). The first mentioned the "thousands of dollars it cost the taxpayers to capture, try and convict just two of the *trigger happy bandits* recently convicted and sentenced to the electric chair." The second article quotes a police official as saying that: "* * * *If the killers of Kelly were not given the death sentence, the electric chair should be destroyed.* * * * *and his opinion being agreed with by those who heard the statement.*"

Prior to Selection of Darcy Jury:

The Intelligencer issue of Monday, June 7, 1948, (Rel. Exs. 80-81; R. 1075a-1078a), which was published and circulated on the day when the selection of the Darcy jury began, contained a frontpage article headed: "UP TO LATE HOUR THIS A. M. NO JUROR HAD BEEN GOTTEN FOR DARCY MURDER TRIAL." The article referred to the petitioner "Whose partners in crime * * * were found guilty last Friday and sentenced to die in the electric chair. * * *" as having gone on trial that morning in Judge Keller's Court. The defendants were referred to as a "trigger happy gang." The article states:

> "From the start of the questioning of jurors this morning, it was evident that great difficulty will be met in selecting a jury.
>
> "Jurors informed the Court that they had read a lot about the case and a number said that they had

'formed a fixed opinion that could not be changed by the evidence.'"

The Intelligencer issue of Tuesday, June 8, 1948, (Rel. Exs. 82-83; R. 1080a-1085a), contained another frontpage article "JUROR BEING QUESTIONED THROWS BOMB SHELL IN COURT." The article referred to a prospective juror's statement on voir dire examination that "* * * *It's the coldest blooded murder that I ever read about.*" The article referred to Darcy as a member of: "A four-team Philadelphia bandit gang that shot up the Feasterville Inn * * * and then held up the Deacon's Inn at Penndel" on December 22.

The same, June 8, 1948, issue of the Intelligencer, (Rel. Ex. 84; R. 1086a), contained a Guest Editorial from the Philadelphia Evening Bulletin entitled "TWO MURDER CONVICTIONS." The editorial commended the Doylestown jury for not being subject to "*maudlin sympathy*" in failing to recommend the death penalty and cited the *Foster-Zeitz verdict as "a vindication of women as jurors.*"

The foregoing newspaper articles and editorials constitute convincing proof of the policy of the press to secure a death penalty in the petitioner's trial. They crystallized the public sentiment and indignation that existed in Doylestown and in Bucks County on June 7, 1948, when the voir dire examination of the jury panel commenced.

Magazine Article.

The publicity following the Feasterville holdup on December 22, 1947, was so widespread in scope and intense and passion-arousing in nature that it culminated in a magazine article entitled: "*KILL-CRAZY*" in the June 1948, issue of a popular sensational national magazine known as "*Front Page Detective*," (Rel. Ex. 136). This article contained a detailed account of the Feasterville holdup and murder, as well as of other holdups, in some of which Darcy was not involved, together with the pictures of the petitioner and the other defendants. *The article being local in interest, was necessarily circulated and widely read throughout Bucks County* (R. 557a-560a; R. 567a-575a; R. 589a-592a; R. 601a-602a).

This magazine was seen in the courtroom during the petitioner's trial in the hands of courtroom spectators (R. 557a-560a; R. 567a-575a; R. 581a-592a; R. 601a-602a).

C.

Radio and Television.

There was wide radio and television coverage both of the holdup and apprehension of the defendants, as well as of the Foster-Zeitz trial. Radio Station WFIL, of Philadelphia, with a broadcast radius covering all of Bucks County, (R. 281a-286a), and Radio Stations WBUS, of Doylestown, (R. 287a-288a), and WBUX of Quakertown, all carried detailed reports of the Foster-Zeitz trial. The Quakertown Free Press issue of May 27, 1948, (Rel. Ex. 123(c);

R. 1125a-1126a), contained a frontpage article headed: "COURT NEWS POPULAR WITH WBUX LISTENERS." The same newspaper's issue of June 10, 1948, (Rel. Ex. 123(d) (e); R. 1127a-1128a), in another frontpage article stated:

> "The murder trials at the courthouse, Doylestown, are being covered by WBUX reporters, and at noon and evening the undertakings of the court are read over the air", (R. 1128a).

D.

The Newspaper Campaign Resulted In Public Passion, Prejudice and Hysteria, Demanding the Death Penalty, Irrespective of the Evidence.

The *campaign to assure the death penalty* for these youths *was crystallized in the expressions of public sentiment* generated by said newspaper articles and editorials, as well as by the radio and television broadcasts. There was a widespread popular sentiment in all sections of Bucks County that all the defendants involved in the Feasterville holdup should be sentenced to the electric chair, *irrespective of the evidence and the law in each case.* This popular sentiment against these youths *permeated throughout the entire Bucks County*, (R. 124a-133a; R. 159a-179a; R. 181a-207a; R. 253a-272a; R. 314a-340a; R. 431a-473a; R. 585a-605a).

The petitioner called seven witnesses to substantiate the contention as to the public sentiment of prejudice and hysteria: Rev. Frank J. Damrosh, St. Paul's Episcopal Church, Doylestown, Pennsylvania, (R. 124a-133a); *Rev. William Babinsky*, of Feasterville, Pennsylvania, Pastor of the Dutch Reformed Church of America, (R. 159a-179a); *G. Coe Farrier*, an attorney and former city solicitor of Philadelphia,

(R. 181a-207a); *Dr. Carl J. Hoffman*, of Philadelphia, a psychiatrist, (R. 253a-272a); *Howard R. Price*, of Charlottesville, Virginia, formerly of Andalusia, Bucks County, an auto parts salesman, (R. 314a-340a); *Miss Alice Patterson*, of Margate, New Jersey, (R. 392a-419a); *Knickerbocker Davis*, Doylestown, Pennsylvania, a journalist, (R. 431a-473a); *Mrs. Inez Darcy Heckman*, a sister of the petitioner, (R. 585a-605a).

These witnesses, in effect, testified that the public sentiment against the petitioner and his companions prior to the petitioner's trial was that they "*should be hanged*," "*ought to be shot*," "*ought to be stamped out like bugs*", (R. 166a), "*should burn*", (R. 188a, R. 203a), "*ought to be hanged*," or "*get the chair*", (R. 257a), "should be lynched, hanged or shot" (R. 318a, R. 438a), "should burn", (R. 394a-395a), should get the "hot seat," or should be "taken out and shot or strung up", (R. 436a), and "did not deserve a trial", (R. 438a, R. 587a), but "should be strung up", (R. 588a).

Mr. Knickerbocker Davis, a magazine writer, and former newspaper correspondent, testified that he was interested in the problem of juvenile delinquency, and that after the Feasterville holdup on December 22, 1947, he *made an independent survey of public opinion of the crime in the Borough of Doylestown and its environs as far as New Hope*. Mr. Davis' survey showed that 70% of the 100-150 persons interviewed by him were shocked and outraged by the crime, and were of the opinion that the participants deserved the death penalty, (R. 433a-435a; R. 438a; R. 441a-443a; R. 448a).

The public sentiment and indignation against these defendants was generated not only by the type of the crime involved, but also by the fact that the participants were Philadelphia youths who had entered Bucks County to commit the holdups with which they were charged. The

newspaper articles and editorials above designated make frequent references to the fact that the defendants were Philadelphians who had made "criminal forays into Bucks County," and the popular sentiment generated by said newspaper articles and editorials reflect the public indignation against the "*outlanders*" from Philadelphia. (R. 259a, R. 260a, R. 318a, R. 333a-337a; R. 394a-396a).

E.

Relisting of Darcy Trial.

Originally the petitioner's trial was not scheduled to be held until the term following the trial of Foster and Zeitz. Suddenly, on June 4, 1948, at the end of the Foster-Zeitz trial, it was decided to hold the Darcy trial immediately on the completion of his companions' trial.

It is uncontradicted that both Judges Boyer and Keller were desirous of having a joint trial of all defendants in order to save time and expense. Both judges were opposed to petitions by Darcy and Capone, asking for separate trials. (Doylestown Daily Intelligencer, Monday, March 1, 1948); (Rel. Ex. 43; R. 999a-1000a).[10]

Thereafter, Darcy and Capone were granted separate trials, pursuant to the Pennsylvania Act of March 31, 1860, P. L. 427, Section 40, (19 Purdon's Penna. Statutes Annotated, Section 785).

The newspapers until Friday, June 4, 1948, reported unequivocally that the Darcy trial was not to be held during the same term of court as the trial of Foster-Zeitz. The

[10] The judges were quoted as desirous of having "a combination trial if possible, covering all defendants" and as commenting that "Separate trials in these cases will mean that it may take a year to dispose of the cases," (R. 1000a).

Intelligencer issue of *Friday, May* 14, 1948, (Rel. Ex. 51; R. 1007a-1008a), commented: "* * * but only two will be tried during the approaching term * * * David Darcy and Felix Capone will be tried later." The Intelligencer issue of *Monday, May* 24, 1948, (Rel. Exs. 55-56; R. 1009a-1012a), stated that: "* * * only two of defendants charged with the murder will go on trial this term * * * Other two * * * tried at later term of court." This statement is reiterated in the issues of *May* 25, 1948, (Rel. Ex. 57; R. 1014a); of *May* 28, 1948, (Rel. Ex. 64; R. 1034a); *May* 29, 1948, (Rel. Ex. 65; R. 1033a), June 1, 1948, (Rel. Ex. 67; R. 1044a), *and June* 2, 1948, (Rel. Ex. 70; R. 1049a). *None of the articles mentioned that Darcy's trial was to start immediately after that of Foster and Zeitz.*

Neither District Attorney Biester, nor Assistant District Attorney Curtin, *repudiated the stories* published by the newspapers as a fact that the petitioner would be tried at the next term of court, (R. 795a; R. 897a-898a).

The Doylestown High School graduation exercises, which for years had been held in the Bucks County Court House, were rescheduled and transferred from the Court House only at the completion of the Foster-Zeitz trial, because according to the Intelligencer, Friday, June 11, 1948, (Rel. Ex. 93), "So many murder trials are cluttering up the Bucks County Criminal Docket * * *".

F.

Darcy Jurors Present in Bucks County Court House on June 1, 1948, During Foster-Zeitz Trial.

The records of the Bucks County Criminal Court show that the traverse jury selected to report on June 1, 1948, did so report in the Bucks County Court House on that date.

Rel. Exs. 10 (c) and (d); R. 949a, R. 952a). The jury that was summoned to appear on June 1, 1948, was not summoned specifically to serve on petitioner's trial, but was summoned generally to serve for the term commencing June 1, 1948, (R. 949a). These jurors were in the court house during the Foster-Zeitz trial and, in fact, some were on that date excused from jury service, (R. 952a). These jurors certainly had the opportunity to attend the sessions of the Foster-Zeitz trial. One, talesman Slaughter, testified that in fact he had been present in court during some of the days of said trial, (R. 1143a).

G.

So Aroused Was the Public Prejudice and Hysteria That It Was Difficult to Impanel a Jury for the Foster-Zeitz Trial.

The public prejudice and hysteria against the youths involved in the Feasterville holdup was rekindled and intensified with the *efforts to impanel a jury to try the case against Foster and Zeitz.* The Bucks County Criminal Court records indicate that the original jury panel summoned to serve on this case was exhausted before a jury was selected, (Rel. Exs. 10(a)-10(g)). The Court thereupon directed that a *special venire* be issued, and the Sheriff summoned and returned from the bystanders and the county at large 50 qualified persons, (Rel. Exs. 10(g)-10(h)). Thereafter, the Court found that, by reason of challenges and otherwise, *both the original panel of 120 jurors and the additional panel of 50 jurors had been exhausted without a jury being selected.* The Court thereupon issued *another order* directing the Sheriff to summon from the bystanders or from the County, 25 additional persons which he promptly did, (Rel.

Exs. 10(g)-10(h)). 142 *persons were examined before a jury of* 12 *jurors* and two alternates were finally selected to serve on the Foster-Zeitz trial, (Rel. Ex. 10(k)).

II.

The Public Prejudice and Hysteria Rekindled During the Foster-Zeitz Trial Became Intensified During the Selection of the Darcy Jurors.

The Feasterville holdup naturally aroused great public indignation throughout Bucks County. The atmosphere of prejudice and hysteria resulting grew in intensity and reached its climax during the selection of the jurors to serve on the petitioner's trial, *so that before the jury was even selected the petitioner was prejudged guilty and deserving of the death penalty. It was impossible for the Commonwealth to isolate the jury panel from which the Darcy trial jury was selected from the highly publicized Foster-Zeitz trial.* As stated, the Criminal Court records of Bucks County show that this jury panel *appeared in the court house on June* 1, 1948, and that they had the best available opportunity to hear and observe that case.

In fact, one talesman, Harry T. Westlake, when asked whether he had formed an opinion as to the petitioner's guilt or innocence, threw a "*bombshell*" into the courtroom when he stated, in the presence of three other jurors who had already been selected for service, that:

> "* * * *It is one of the most cold-blooded murders I ever heard of*", (Rel. Ex. 5A; R. 1141a-1142a).

According to the record of voir dire examination of prospective jurors in the Foster-Zeitz trial, 142 jurors were examined on May 24, 25, 26 and 27 before the jury was

completed. 80 jurors were examined on the voir dire examination in the Darcy trial on June 7 and 8, 1948 before the jury was completed. *In short, a total of 222 jurors were examined on voir dire examination in both trials before the juries were completed.* Both juries were selected from all sections of Bucks County and reflected the public sentiment of their respective sections.

(a)

Analysis of Voir Dire Examinations.

An analysis of the voir dire examination of the jurors called for the Foster-Zeitz case shows:

Foster-Zeitz Case

	Read Newspapers	Discussed Case	Fixed Opinion
Jurors examined—	142	142	142
Not asked question—	52	62	64
Asked question—	90	80	78
Answered No—	32	48	62
Answered Yes—	58	32	16
Percentage of those asked answering yes—	63%	40%	20%

An analysis of the voir dire examination of the jurors called for the Darcy case shows:

Darcy Case

	Read Newspapers	Discussed Case	Fixed Opinion
Jurors examined—	80	80	80
Not asked question—	21	36	25
Asked question—	59	44	55
Answered No—	7	22	39
Answered Yes—	52	22	16
Percentage of those asked answering yes—	89%	50%	30%

An analysis of the voir dire examination of the jurors called for both cases shows:

	Read Newspapers	Discussed Case	Fixed Opinion
Foster-Zeitz Jurors	63%	40%	20%
Darcy Jurors	89%	50%	30%
Change between trials	26%	10%	10%

Thus, in the petitioner's trial, approximately one-third of the jurors called to try him who were asked the question whether they had fixed opinions, stood up in open court and said that they had fixed opinions, derived from reading newspapers and hearing the case discussed.

An examination of the testimony taken on voir dire examination in the petitioner's trial reveals a remarkable increase in intensity and fixity of opinion—*the crystallization of public sentiment against the petitioner was apparent.*

I.

Judge Boyer's Excessive Interest, Attendance and Participation in the Petitioner's Trial Deprived him of a Fair Trial and Constituted a Denial of Due Process.

Judge Calvin S. Boyer, who presided at the Foster-Zeitz trial, evidenced his personal antagonism and hostility against all of the defendants—at least from the date of the presentation of petitioner's petition for severances.

The Intelligencer issue of Monday, March 1, 1948, (Rel. Ex. 43; R. 999a-1000a), quoted Judge Boyer and Judge Keller as commenting that:

> "Separate trials in these cases will mean that it may take a year to dispose of the cases."

After the Foster-Zeitz verdict, the Intelligencer issue of Saturday, June 5, 1948, (Rel. Ex. 78; R. 1071a-1072a), quoted Judge Boyer as praising the jury for its verdict condemning the "two killers to electric chair."

The Intelligencer issue of Saturday, June 12, 1948, (Rel. Exs. 94-95; R. 1094a-1096a), under the heading on the front page:

"JUDGE BOYER WARNS THAT BUCKS COUNTY IS TIRED OF THIEVES FROM PHILADELPHIA."

and the sub-heading headed:

"Court Warns Youth That County Intends to Do Something About It—Asks Defendant Whether He Wants to Get Into Position of Killers Who Were Sentenced to Electric Chair."

quotes Judge Boyer as asserting that:

> "We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which isn't being watched * * * What business did you have to come up here in the first place?"

Judge Boyer's comments were made in connection with the sentencing of an 18-year-old Philadelphian, Robert White, who had pleaded guilty to stealing a car radio. He is quoted as having further stated:

> "We in Bucks County are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it". (R. 1094a, R. 1095a).

The foregoing newspaper articles characterized his antagonism and prejudice against all the youths involved in the Feasterville Tavern holdup.

His antagonism was crystallized in the editorial which appeared in the Intelligencer issue of Thursday, June 17, 1948, (Rel. Ex. 105; R. 1103a-1104a), under the heading: *"RAUS MIT 'EM."* Apparently, the newspaper recognized the significance of "Judge Calvin S. Boyer's warning to tough crooks from Philadelphia and other places to keep out of Bucks County or take the consequences." The editorial continued:

> "The warning has been given before, but not under such impressive circumstances.
>
> "At any rate the jurors in the Feasterville slaying case probably indicated the reaction of people in this county to the vicious lawlessness of a great many young crooks who have operated in the county.
>
> * * *
>
> "The conviction of the three young men for a wanton and unprovoked murder * * * and the imposition of

the death sentence * * * together with Judge Boyer's warning * * * it is hoped will cause bandits and killers to steer clear of the county.

"Getting tough has worked that way in other instances."

This editorial recognized that the verdict was an indication of not only Judge Boyer's personal sentiments but also of other Bucks Countians "* * * that leniency has merely been taken as an indication of weakness * * *".

Mr. Knickerbocker Davis testified that during the Foster-Zeitz trial Judge Boyer had told him that he thought the defendants were "hardened" and "callous criminals", (R. 446a-448a).

Judge Boyer's attendance and participation at Darcy's trial must be taken into consideration with his expressed personal sentiments—a deep-seated antagonism and prejudice against "outlanders" and killers. The records of the Bucks County Criminal Court indicate that, although Judge Keller did not participate in any phase of the Foster-Zeitz trial which had been presided over by Judge Boyer, that Judge Boyer actively participated, together with Judge Keller, in the petitioner's trial.

During the petitioner's trial, Judge Boyer appeared in the courtroom, together with Judge Keller, when the case was called for trial on the mornings of June 7, 8, 9, 10, 11, 12 and 14, 1948, as well as at all afternoon sessions, (Rel. Ex. 115(c); R. 1117a-1119a). That Judge Boyer appeared on the bench at the beginning of all morning and afternoon sessions of Darcy's trial was not contradicted but was corroborated by the respondents' witnesses, (R. 312a, R. 362a, R. 379a). Moreover, it was corroborated by the Criminal Court records.

In addition to sitting on the bench with Judge Keller at the beginning of each session, Judge Boyer, at petitioner's

trial, appeared at different times as a spectator in the court room.

Judge Boyer sat in a chair on the front row of the chairs in the front of the court room in the section reserved for attorneys, *directly facing and about twenty-three feet away from the jury*, where he could be plainly seen and observed by the jury, (R. 479a, R. 486a, R. 488a, R. 509a, R. 515a-517a, R. 535a, R. 541a, R. 542a-545a, R. 556a, R. 592a-593a, R. 613a, R. 617a, R. 628a, R. 727a-728a, R. 731a-733a, R. 739a, R. 875a-876a, R. 911a; Rel. Exs. 118, 119 and 135; R. 1120a, R. 1121a and R. 1131a). This fact is not contradicted by the respondents' evidence. So great was Judge Boyer's interest in the outcome of this case that he sat as a spectator in the court room in the section reserved for attorneys during the evening session held on Friday, June 11, 1948, for the entire session, which lasted about two to two and one-half hours, (R. 487a-489a).

Further, during the Darcy trial, not only did Judge Boyer sit on the bench with Judge Keller at the beginning of each session, but on certain occasions he remained throughout the session, and on other occasions he left and then returned to the bench. On the occasions he sat on the bench with Judge Keller, he assisted and conferred with him in the conduct of the trial of the petitioner and participated in various rulings, particularly regarding the admissibility of evidence (R. 488a, R. 499a-501a, R. 540a-542a, R. 592a, R. 605a, R. 612a, R. 619a-622a, R. 625a, R. 781a, R. 875a-876a, R. 906a-907a).

It is also uncontradicted that at the session held on Saturday, June 12, 1948, Judge Boyer actively participated in the ruling of admissibility of a joint confession made by all the defendants. *This question admittedly involved a difficult evidentiary problem.* As a result of the ruling, the jury was permitted to take into consideration parts of the written statements of the defendants wherein Darcy

admitted participation in other holdups. When Mr. Achey, the petitioner's counsel, objected to the offer, Judge Boyer imposed: "That applies only to cross-examination", (Rel. Ex. 5E; R. 1144a-1146a). Although Mr. Achey objected to Judge Boyer's participation and although Judge Boyer thereafter withdrew from the bench, the fact and effect of Judge Boyer's participation in the foregoing ruling was observable by both the spectators and jurors, (R. 479a, R. 535a, R. 541a, R. 612a, R. 781a-782a, R. 784a, R. 884a, R. 909a-910a). The impact of Judge Boyer's participation on the jury was necessarily great, because soon after this ruling the Commonwealth closed its case and the defense offered no evidence.

To climax Judge Boyer's extraordinary interest and participation in petitioner's case were the events of Monday, June 14, 1948. During Judge Keller's charge to the jury, Judge Boyer was seated in the section of the court room reserved for attorneys. Next to him was seated District Attorney Biester. Both Judge Boyer and Mr. Biester were seated so that they were plainly observable by the jurors, (R. 481a, R. 517a, R. 542a-544a, R. 546a-548a, R. 612a-613a, R. 628a-629a).

Towards the close of the Court's Charge, Judge Keller inquired of counsel for the Commonwealth and for the defense whether the Court had overlooked anything and whether there were any corrections to be made, (Rel. Ex. 5E; R. 1146a-1150a). Mr. Achey, defense counsel, answered that he had nothing to add, (R. 1148a). The Court thereupon resumed its Charge. At this point, Judge Boyer, who was seated next to District Attorney Biester, handed the latter a note. Mr. Biester read the note, then arose from his chair and approached the bench where Judge Keller was concluding his Charge. Mr. Biester succeeded in attracting Judge Keller's attention and stated:

"I may have misunderstood part of your Charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree" (R. 1149a).

Judge Boyer's participation and assistance in the District Attorney's correction of Judge Keller's instruction to the jury was observable by both the spectators and jurors in the court room, (R. 481a-487a, R. 505a-506a, R. 516a-523a, R. 542a-544a, R. 548a-554a, R. 556a, R. 612a-616a, R. 626a-629a).

The attendance and participation of Judge Boyer at petitioner's trial, both when he sat on the bench with Judge Keller and also on the occasions when he sat in the section reserved for attorneys (especially on the Friday evening session of June 11, and the Monday, June 14 session) was observable by both the spectators and jurors in the court room and was a constant reminder to them of the Foster-Zeitz trial and Judge Boyer's praise to the Foster-Zeitz jury for their services in having rendered verdicts of guilty with death penalties. Judge Boyer's attendance and active participation was not affirmatively contradicted by the respondents.

J.

Respondents' Evidence.

The respondents' evidence, which was, in effect, adopted by the District Court and the court below, did not attempt to contradict these facts: (1) that there was newspaper publicity and editorials concerning the Feasterville Tavern

holdup, as shown by the petitioner herein; (2) that there were public expressions of indignation as testified to by the seven witnesses called by the petitioner; (3) that there was widespread newspaper publicity and radio broadcasts of the Foster-Zeitz trial; (4) that Judge Boyer, both before, during and after the petitioner's trial displayed his personal feelings against these defendants; (5) that petitioner's trial was originally scheduled to start at the term following the Foster-Zeitz trial and was only rescheduled to commence immediately thereafter during the last days of the first trial; (6) that, according to the Criminal Court records, the jury panel from which the petitioner's jury was drawn, appeared in the court house during the Foster-Zeitz trial and had the opportunity to attend and listen to it; (7) that the voir dire examination in petitioner's trial showed a marked increase in fixed opinions of the jury, so that almost *one out of every three jurors* asked the question admitted he had a fixed opinion in the case; (8) that Judge Boyer did sit both on the bench and in the courtroom almost daily throughout petitioner's trial and did participate in at least one ruling on the most vital question in the case.

The respondents' evidence did not counter-act the cumulative effect of all the foregoing factors on the trial of the petitioner—the effect being of such a nature that his guilt and the death penalty which he eventually received were both prejudged by the jury.

In short, the respondents' evidence, that is the certificate of Judge Keller, (Resp. Ex. 5; R. 1133a-1140a), and the testimony of District Attorney Biester, Assistant District Attorney Curtin, the various tipstaves, state troopers, Doylestown police and jail wardens was designed to establish only two factors: (1) the decorum of the petitioner's trial itself and (2) the segregation of the petitioner's jury.

6.

ARGUMENT.

I.

Summary of argument.

1. This case presents the following issues: (a) whether the petitioner in a habeas corpus case had not been denied due process of law under the Fourteenth Amendment merely because there was no proof that the physical presence of a mob or a threat of mob violence had dominated his trial on a capital charge in a state court, and (b) whether such petitioner had been denied due process of the law by having been compelled to have his case tried before both a trial judge and a jury and also before an "overseer judge" who had shown such a * * * "striking manifestation of extraordinary interest in the proceedings", (R. 1250), as to make his attendance, participation and conduct in the petitioner's trial "extraordinary and unprecedented", (R. 1264).

2. All seven (7) of the judges in the court below were of the opinion, as stated by the majority, that: "The situation certainly would have justified a decision to wait awhile before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions, * * *", (R. 1248).

The judges were divided (4-3) as to whether the failure to follow the "*wiser course*" was a denial of the essence of fair trial.

3. There was uncontradicted evidence at the hearing before the District Court that the trial was dominated by a more subtle, and even a more direct, type of trial domination than a physical presence of a mob or a threat of mob violence. There was evidence that: (a) the local newspapers, by their inflammatory and prejudicial articles and editorials carried on a campaign to secure the death penalty for petitioner, irrespective of the evidence and extenuating circumstances, (b) that such newspaper campaign influenced and guided public opinion to such a degree that by the date of the petitioner's trial the death penalty eventually imposed had already been prejudged, (c) that the petitioner's trial, originally scheduled to start at the term of court following the trial of his companions, was suddenly rescheduled to start immediately thereafter when it was apparent that death penalties would be imposed in that trial, and *did begin on the first court day* after his companions' trial had been completed, (d) that the jury panel selected to try petitioner had been present in the court house during the trial of his companions, (e) that 89% of the jurors asked the question had answered that they had read the newspaper accounts of the prior trial, 50% of those asked answered that they had discussed the case, and 30% of those asked answered that they had fixed opinions about the case, and (f) that petitioner was tried by a "two-judge" bench, consisting of the trial judge and the judge, who had just three days before completed presiding in the trial of his companions, and had publicly praised the jury's fixing their penalty at death as the only possible penalty, who acted as an "overseer judge" and as an aid to the prosecutor in petitioner's trial, who was known by the jurors to be "hostile" to petitioner, and whose attendance and active participation influenced and guided the jury's imposition of the death penalty.

The failure of the trial court sua sponte to change venue

or to continue the trial constituted a denial of due process. *Shepherd vs. Florida*, 341 U. S. 50, (1951) and *Moore vs. Dempsey*, 261 U. S. 86, (1923).

4. Three of the seven judges in the court below, recognized Judge Boyer's "rather striking manifestation of extraordinary interest in the proceedings" as constituting such a fundamental impropriety in a state trial, which should be corrected by a Federal Court under the due process clause of the Fourteenth Amendment.

The trial before *two judges* and a jury does not constitute due process of law, especially where the judge, other than the trial judge, has publicly evinced bias and prejudice against the accused and his companions and has assumed the role of a judge and prosecutor in his desire to assure the accused's receiving the death penalty. It would be very strange if our system of law permitted a judge, whether the trial judge or an "*overseer judge*", to act as a prosecutor and then try the very person accused as a result of his investigation.

Judge Boyer, by his public declaration of satisfaction with the death penalty imposed by the jury in the Foster-Zeitz case, became a "*prosecuting judge*" in the Darey trial. Having made public his antagonism towards "outlanders", and towards the petitioner and his companions in particular, Judge Boyer could not be, in the very nature of things, wholly disinterested in the conviction or acquittal of the petitioner or in the penalty he was to receive, whether death or life imprisonment.

As stated in *In the Matter of Murchison*, 349 U. S. 133, (137), (1955):

> "* * * Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer * * *."

5. A fair trial in a *fair tribunal* is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. Our system of law has always endeavored to prevent even the possibility of unfairness. This Court has said that: "Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law": *Tumey vs. State of Ohio*, 273 U. S. 510, (532).

Where a judge, other than a trial judge, so actively participates in the trial of a case, as did Judge Boyer in the instant case, and where such judge is "known" by the trial jury to be antagonistic to the accused on trial to such an extent that all seven (7) members of the Court of Appeals recognize his "rather striking manifestation of extraordinary interest in the proceedings", as a "dubious occurrence" in state procedure, then there cannot be the slightest doubt that such "*overseer judge*" has deprived the accused of a right under the Constitution. It is a right of the accused to be tried by a *legally constituted court*, not by a kangaroo court or a court which is intent upon his receiving the death penalty. A legally constituted court consists of but one trial judge, and not of a trial judge and an "overseer judge".

6. Certainly the proceedings in petitioner's trial—, in and out of the court room, both before and during the trial—, established that he did not receive a fair trial. The conviction in the instant case was clearly brought about by methods that offend "a sense of justice". Not only was Darcy tried in an atmosphere of prejudice and hysteria engendered by inflammatory newspaper articles that reached their climax during the two weeks of the Foster-Zeitz trial and evidenced by uncontradicted expressions of

public opinion against Darcy, but he was also tried before a "*two-judge*" bench, by a District Attorney and one member of such bench.

The petitioner's trial and conviction under such circumstances necessarily "shocks the conscience", offends "a sense of justice" and runs counter to "decencies and civilized conduct" as well as to "the community's sense of fair play and decency". Not only was Darcy prejudged guilty before his trial, but his conviction and the imposition of the death penalty were guaranteed by Judge Boyer's "extraordinary interest" in his trial and Judge Boyer's active participation therein and constituted a denial of due process.

II.

The failure of the State Court in a capital case sua sponte to change the venue or to continue petitioner's trial, where the case had been prejudged by the citizens of the county due to local newspaper campaign designed to secure death penalty and where the trial was suddenly scheduled to start after end of companions' trial imposing death penalties, violated the due process clause of the Fourteenth Amendment.

A.

The Public Prejudice and Passion, Engendered by Out-of-Court Newspaper Campaign, Dictated the Imposition of the Death Penalty by the Jury Just as Effectively and Forcefully as the Physical Presence of a Mob or the Threat of Mob Violence.

The rights here violated are of the kind which this Court has always been diligent to protect. Whether federal guar-

antees of the sort here involved have been violated is a question which this Court has consistently determined itself by independent examination of the record: *Cassell vs. Texas*, 339 U. S. 282 (1950); *Haley vs. Ohio*, 332 U. S. 596 (1948); *Malinski vs. New York*, 324 U. S. 401 (1945).

The Fourteenth Amendment prohibits the conviction "* * * of one whose trial is offensive to the common and fundamental ideas of fairness and right": *Betts vs. Brady*, 316 U. S. 455 (1942); *Buchalter vs. New York*, 319 U. S. 427, 429 (1943); *Rochin vs. California*, 342 U. S. 165, 169 (1952).

As stated by Biggs, Chief Judge, in his dissenting opinion:

> "* * * The judicial process under which Darcy was tried was so distorted by circumstances, both in and out of the courtroom, as to result in fundamental unfairness. * * * By editorials, news stories and comments, the press prejudged Darcy's case and prejudiced the minds of the citizenry against him. I cannot believe that all members of the jury remained uninfluenced by these publications", (R. 1265-1266).

The majority opinion in the Court below, relative to petitioner's claim that he was tried in an atmosphere of prejudice and hysteria, clearly shows that the majority had *mental reservations* in their holding that the petitioner's trial at the time and place in question was not a denial of due process.

The following factual findings, which the majority made on the score of the circumstances prior to and during the trial itself, (aside from Judge Boyer's presence in the court room and participation during Darcy's trial), would have substantiated a conclusion that petitioner's trial at the time and place in question was a denial of due process under the Fourteenth Amendment:

> "* * * (Relator has relied upon) the daily newspaper accounts and editorial comments published in the

community during the trial of two of relator's alleged confederates, which ended only three days before he himself was required to stand trial."

"The evidence * * * indicates that during the two weeks immediately preceding relator's trial, the community in general had experienced a revival and quickening of interest in the homicide attended by many expressions of indignation against its perpetrators."

"* * * The evidence makes it very probable that they (the jurors) also knew that he (Judge Boyer) had just completed the trial at which relator's co-defendants had been convicted and sentenced to death."

"* * * But another judge of the same Court, Hon. Calvin Boyer, was much in and about the courtroom during the course of this trial. Judge Boyer had just completed a trial at which relator's confederates had been convicted of first degree murder without recommendation of mercy and, according to the press, he had commended the jury for its verdict."

"* * * The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community, if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances it would have been wise to take such precautions * * *", (R. 1245-1248).

Despite these significant and critical findings and despite the uncontradicted evidence as to the increased fixity of opinion as to Darcy's guilt as evidenced by the voir dire examination, the majority of the Court below concluded that it was not convinced "* * * that failure to follow the 'wiser course' was a denial of the essence of fair trial", (R. 1248).

The majority's conclusion that petitioner was not tried in a community, so aroused against him that a fair trial was

impossible, was based upon the misapplication of two legal principles: (1) that *Frank vs. Mangum*, 237 U. S. 309 (1915); *Moore vs. Dempsey*, 261 U. S. 86 (1923); and *Powell vs. Alabama*, 287 U. S. 45 (1932), warrant a conclusion that one was tried in a community so aroused against him that a fair trial was impossible *only* where there is proof that physical presence of a mob or a threat of mob violence has dominated a criminal trial; and (2) that the fact that petitioner was afforded the right of voir dire examination necessarily nullified his claim that he was tried in an atmosphere of prejudice and hysteria.

The rationale of *Moore vs. Dempsey*, 261 U. S. 86, which requires that a defendant be afforded a trial free from mob domination and from passion and prejudice, can usually be satisfied in only one of two ways, should such an atmosphere exist where and when the trial is scheduled,—by a change of either the time or the place of trial.

When the record discloses that local newspapers printed inflammatory stories and articles between the date of the crime and the date of his companions' trial; that for two weeks during the trial of his companions, the newspapers printed inflammatory accounts thereof; that the trial judge in the first case publicly praised the jury for having imposed the death penalties; that the public prejudice and passion were rekindled and intensified by the news accounts of the first trial; *then* passion and prejudice have reached a stage, from which they should be permitted to subside by the passage of time, before holding a trial for the crime which precipitated the newspaper campaign and passion and prejudice in the area in which they occurred.

In *Shepherd vs. Florida*, 341 U. S. 50, the respondents attempted to establish that the violence and attendant passion were isolated from the trial by space and time. They asserted that all the violence occurred far from the court house, and that by the time of the arraignment, on August

12, the whole of the county was so quiet and peaceable that the petitioners remained there until the trial on September 1 "without the slightest untoward incident being revealed by the record."

This Court, in the *Shepherd* case, in effect, found that this prejudicial atmosphere—engendered by inflammatory newspaper publicity that reached into every corner of the county—had not subsided by the time of trial. *The fact that defendants could be safely imprisoned within the county was but the slightest evidence of a healthy attitude* —contradicted by the Court's special order compelling the search of persons and property entering the courtroom, and continuous newspaper publicity.

Likewise, in the instant case, the mere fact that the trial was conducted with *dignity and decorum*, without any hostile congregation or demonstration, without the court room having been crowded and with the precautions having been taken for keeping the jury under strict guard—*does not necessarily warrant a conclusion that the trial was not held in an atmosphere of prejudice and hysteria.*

This Court has recognized that violence is not so easily replaced by calm. In *Milk Wagon Drivers Union vs. Meadow Moor Dairies, Inc.*, 312 U. S. 287, (1941), the Court stated:

> "* * * In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful * * *", (p. 294).

The inflammatory and prejudicial articles and editorials of expressions of public passion and prejudice against Darcy and the increase in fixity of opinion permeated the petitioner's trial and contaminated it as much as if there had been evidence of the physical presence of a mob or a threat of mob violence.

(a)

Newspaper reporting was not factual and editorials were not fair comment.

An examination of the newspaper articles and editorials shows that the newspapers' reporting of the crime and of the Foster-Zeitz trial was not factual and that the editorials were not fair comment, (R. 953a-1116a, R. 1123a-1130a).

A. Russell Thomas, reporter for the Daily Intelligencer, when questioned relative to the statement in the article in the December 26, 1947, issue, (Rel. Exs. 16-17; R. 964a-966a)—that "the general feeling of the public—in Bucks County at least—appears to be that no time should be spared in bringing the bandits to trial, and that it is a 'break' for society at large to have the trial in Bucks County rather than in Philadelphia", testified that the report had been "editorialized" by the front office, (R. 428a).

The newspaper articles show an attempt to dramatize the crime and the trial, obviously to prejudice the readers against these youths. The characterization of the four defendants as "bandits", "thugs", "holdup men", "all Philadelphians", "gunmen" time and time again in the newspaper article does not reflect factual reporting. The reference to Kelly as "a popular citizen", (Rel. Ex. 21; R. 972a), and as a "highly respected citizen", (Rel. Ex. 63; R. 1032a), was not factual reporting but obviously an attempt to prejudice the readers against these defendants. The statement that the defendants "morally killed three men", (Rel. Ex. 72; R. 1055a), is not factual reporting, but was obviously an attempt to prejudice the readers. The reference to the defendants' "sensational 30 day crime spree * * * during which seven persons (were) shot (and) (1) murdered and 9 places held up by 4", (Rel. Exs. 72 and 73; R. 1056a,

R. 1059a), is not factual, but an attempt to prejudice the readers. The reference to the defendants as "callous" and "gangsters" and "gun toters", (Rel. Ex. 20; R. 970a), is at most overdramatized reporting and effective propaganda.

The following dramatic descriptive words are found in the newspaper accounts of the crime and trials: "quartet of armed bandits", "shot three men", (Rel. Ex. 12; R. 953a); use of the word, "bandits", 15 times and the word, "thugs", 5 times in one article, (Rel. Ex. 13; R. 955a-958a); "all Philadelphians", (Rel. Ex. 14; R. 959a); "gunmen", "holdups", "shoot it out", "bandits", (Rel. Exs. 14-15; R. 959a-963a); "four way murder case", "young Philadelphians", "bandits", (Rel. Exs. 16-17; R. 964a-966a); "bandits", "Philadelphians", "wild chase", "shot their way out", (Rel. Exs. 18-19; R. 967a-969a); "potential killers", "callous shooting", "trigger happy bandits", etc., (Rel. Ex. 20; R. 970a); "thugs", "trigger-happy bandits", (Rel. Ex. 21; R. 972a); "hard-boiled", "wise cracking", etc., (Rel. Ex. 65; R. 1038a); "morally killed three men", "callousness", "outrageous", "escapade", "sensational 30 day crime spree", (Rel. Exs. 72-73; R. 1055a-1056a); "bravado", "killers", "Philadelphians", (Rel. Ex. 78; R. 1068a).

The foregoing are only a few examples of the non-factual and overdramatic descriptive words used by the newspaper in reporting the crime in the Foster-Zeitz trial.

Further, the headlines carried on the front page of the newspapers were not factual, but clearly intended to dramatize the crime and the trial and to impress the readers with the criminal activities of the defendants. The headline relative to juror Westlake having thrown a "bomb shell" into the court, during his voir dire examination, necessarily impressed the readers with his feeling that he considered this as the "coldest-blooded murder" that he ever read about. (Rel. Ex. 62; R. 1080a).

Likewise the editorials showed the newspaper policy de-

signed to secure the death penalty for these defendants, (Rel. Exs. 20, 22, 31, 42, 48, 49, 84, 90, 105; R. 970a, R. 974a, R. 982a, R. 998a, R. 1003a, R. 1005a, R. 1086a, R. 1093a, R. 1103a).

An examination of the editorials discloses that the newspapers criticized the leniency exercised by jurors and even condoned *mob law*. None of the editorials even leaves to the juror's discretion the determination of the guilt or innocence of a defendant or the penalty to be fixed.

The following entitled editorials demand convictions and the stiffest penalties, irrespective of the evidence and the applicable law in each case:

"FAST POLICE WORK", (R. 970a-971a);
"ERRORS OF JURORS", (R. 974a-975a);
"WHO'LL BE THE NEXT?" (R. 982a-983a);
"TIME FOR AN EXAMPLE", (R. 998a);
"JURORS REBUKED AGAIN", (R. 1005a-1006a);
"VERDICTS HIGHLY PRAISED", (R. 1093a); and
"RAUS MIT 'EM", (R. 1103a-1104a).

Newspaper accounts and editorials relative to the crime and trials were carried in the Philadelphia newspapers, as well as in the local Bucks County newspapers. These newspapers had large circulations and reached practically every adult in Bucks County.

Radio stations WBUS at Doylestown and WBUX at Quakertown had their reporters covering the murder trials at the Doylestown Court House and reporting the news thereof at each noon and evening broadcast, (R. 1126a-1128a).

The prosecution of the petitioner and his companions was characterized by "Bucks County Justice" as expressed by the newspaper articles and editorials in the various issues of the newspapers and the testimony of witnesses, (R. 318a,

R. 965a, R. 1099a, R. 1102a, R. 1103a). These articles and editorials show a designed plan to secure the death penalty for the petitioner irrespective of the particular facts of his case.

The Intelligencer issue of December 26, 1947, states:

> "*Feeling Runs High.*
>
> The general feeling of the public—in Bucks county at least—appears to be that no time should be spared in bringing the youthful bandits to trial, and that it is a 'break' for society at large to have the trials in Bucks County rather than in Philadelphia", (Rel. Exs. 16 and 17; R. 965a-966a).

The editorial entitled, "ERRORS OF JURORS", in the December 31, 1947, issue, (Rel. Ex. 22; R. 974a-975a), criticized the inefficiency of jurors and demanded that jurors be "courageous and conscientious in the performance of their duties". The Intelligencer issue of January 16, 1948, in the column, "The Gossiper", (Rel. Ex. 25; R. 979a), demanded that if "* * * courts and jurors were to dispense with a lot of the sentimentality about criminals * * * the general public would not face so many horrible crimes as horrify newspaper readers daily." The Intelligencer issue of February 2, 1948, (Rel. Ex. 31; R. 982a-983a), contained an editorial headed, "WHO'LL BE THE NEXT", plainly condoned mob law in its statement that "It would be lamentable if citizens were forced to take the punishment of them into their own hands". An editorial in the Intelligencer issue of February 18, 1948, (Rel. Ex. 42; R. 998a), headed, "TIME FOR AN EXAMPLE", demanded that example be made of Philadelphia's young criminals who made criminal fofays into Bucks County.

Further proof that the newspaper reports of the crime and the Foster-Zeitz trial were not true and accurate but

were inflammatory and prejudicial is seen in the Intelligencer issue of Thursday, June 3, 1948, (Rel. Exs. 72-73; R. 1056a-1061a). There, in a frontpage article headed "Defense in Murder Trial Decides Not to Offer Evidence," it is stated that:

> "Seven persons were shot, one was murdered and nine places were held up by the four accused Philadelphians, according to the statements submitted in evidence in court yesterday, and signed by Zeitz, Foster, Darcy and Capone", (R. 1059a).

This article is incorrect inasmuch as it is uncontradicted that *Darcy did not participate and was not involved in four of such holdups*. The confessions admitted in evidence in the Foster-Zeitz trial clearly show that Darcy was not a participant. Only three of the seven confessions were received at the petitioner's trial and upon objection by defense counsel that part pertaining to one holdup, in which the petitioner was not involved, was excluded with cautionary instructions. (Opinion Denying Petition, Footnotes 15 and 16; R. 1203a and R. 1204a).

This example of incorrect newspaper reporting recalls a similar occurrence in *Shepherd v. Florida*, supra. There newspaper men testified that the sheriff told them that petitioners had confessed and that they published this fact in their newspapers. The alleged confessions were not introduced in evidence, but, as here, news of the alleged confessions was widely published. This Court sharply criticized such unrepudiated newspaper reporting.

In the instant case, 89% of the jurors examined and asked the question testified that they had read of the case in the newspapers, (Brief, p. 36). Certainly, there is nothing in the record to show that the grossly false statement in said article had ever been corrected.

The atmosphere of prejudice and hysteria demanding execution of the death penalty for the petitioner existing at the time of his trial continues even up to the time of the argument before the Court of Appeals, as evidenced by the recent newspaper articles in the Philadelphia newspapers. These articles, even though published at a later date, are corroboration of such prejudice, according to Mr. Justice Holmes' opinion, in *Moore v. Dempsey*, 261 U. S. 86 (90):

> "The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor, about a year later, earnestly urging him not to interfere with the execution of the petitioners."

(b)

There Was Widespread Public Sentiment Against Petitioner.

It is further uncontradicted that the foregoing newspaper campaign resulted in widespread antagonism against Darcy in Bucks County: Public opinion against these defendants grew in such intensity from the date of the holdup that it amounted to an atmosphere of hysteria and prejudice, reaching its climax at the Darcy trial.

Reverend Frank J. Damrosh, of St. Paul's Episcopal Church, Doylestown, testified that the general feeling towards Darcy and the other defendants, within a ten-mile radius of Feasterville, was "that they were all guilty" and that *"no other case in 18 years in Bucks County that aroused the state of feeling"*. (R. 130a-131a). *Reverend William Babinsky*, of the Dutch Reformed Church of America, Feasterville, testified that, within a radius of Feasterville, he had heard such remarks as that "the boys don't need a trial", "should be condemned to death", "should have no

mercy", "ought to be hanged", "ought to be shot", "stamped out like bugs", "there should be no mercy", "they ought to get the chair", (R.160a-166a). *Coe Farrier*, an attorney, testified that en route on the commuter's train to Philadelphia, and within the radius of Feasterville, Langhorne and Southampton, he heard such expressions against defendants from Bucks Countians: "these kids should burn", "the only thing should happen to them was they should burn", (R. 187a); "are you keeping those murderers out", "when are they going to burn", "how long do you think you can keep them away from the hot spot", "I think they all should burn", (R. 188a); "these fellows ought to burn", (R. 202a); and "they wanted an eye for an eye, a tooth for a tooth", (R. 206a). *Dr. Carl J. Hoffman* testified that within an area of Richboro, Newtown and Feasterville, he heard such expressions against defendants as "they ought to be hanged", "get the chair", or "why bother with them", (R. 257a); "the idea of boys in Philadelphia coming into Bucks County", consider them "as gangsters and undesirable elements", (R. 258a); "the boys were gangsters * * * they should have stayed in Philadelphia", (R. 259a); "there should be no mercy" and "we should throw them out", (R. 260a); "they should be hung", (R. 267a). *Mr. Howard Price* testified that, within an area surrounding Bristol and Sellersville, he heard such expressions as "the boys were from out of town * * * from Philadelphia. They should be given *Bucks County justice*", "lynch", "hang" and "shot", (R. 317a-319a). *Mr. Knickerbocker Davis*, who made an independent survey in the area surrounding Doylestown and as far north as New Hope, testified that he heard such expressions as "hope they get the hot seat", "* * * see them taken out and shot * * *", "* * * like to see them strung up * * *", (R. 436a-437a). *Mrs. Inez Darcy Heckman*, Darcy's sister, testified that, within the area of Doylestown Borough, she had heard such expressions as the defendants "don't

deserve a trial", (R. 587a), and that "well, he doesn't stand a chance here", and "well, he is going to get it too", referring to the imminent trial of her brother, (R. 589a). *Miss Alice Patterson*, Zeitz's aunt, testified that during his trial, she heard the following expression at the Doylestown Inn: "they haven't got a chance in Doylestown because they hated Philadelphia boys, and they were very bitter", (R. 394a).

The foregoing expressions of public sentiment and indignation against these defendants, and particularly against the petitioner, *were not contradicted* by the respondents. Not one of the witnesses called by the respondents testified that he had *not heard such expressions* condemning and castigating the defendants.

At most, *the certificate of Judge Keller*, (Resp. Ex. 5; (R. 1133a), and the testimony of the District Attorney and his Assistant, as well as the testimony of the tipstaves, the state trooper and other police officers, constituted merely general statements denying the existence of an atmosphere of prejudice and hysteria. This the District Court summarized as being to the effect that "there were no outbursts, no disturbances, no untoward incidents either in or outside the court room, in Doylestown, or elsewhere throughout the county," (R. 1212a-1213a).

The District Court indicated that in order for the petitioner to prove that there was a public sentiment amounting to an atmosphere of hysteria and prejudice against him, the petitioner was under a duty to bring into court all citizens who were adults in 1948 and to have them affirmatively testify in support of his contention. Such a burden could never have been met by the petitioner. It must also be remembered that it was necessarily very difficult for the petitioner at this later date to secure Bucks Countians, who would testify that they themselves had advocated lynching, or mob law, or that they had demanded that the youths involved in the holdup receive the death penalty, irrespective of the evidence and law in each case.

Darcy's trial commenced on June 7, 1948, in spite of the passion and prejudice that had been aroused by the tremendous amount of newspaper articles and editorials of an inflammatory character, that reached a climax during the Foster-Zeitz trial.

B.

Darcy's Trial Was Rendered Unfair and the Severance Theretofore Granted Made Worthless by Being Suddenly Advanced to Start after End of Companions' Trial and after Trial Judge Therein Had Publicly Praised Jury for its Imposition of Death Penalties.

Darcy had been granted a separate trial pursuant to the Pennsylvania Act of March 31, 1860, P. L. 427, 19 Purdon's Penna. Statutes Annotated, Section 785.

The rationale for such severance was that he should be fairly tried in a public tribunal free of "prejudice, passion, hysteria and tyrannical power".

The finding of the majority of the Court of Appeals that "the situation certainly would have justified a decision to wait a while before trying the relator or else to try him in another community * * *", (R. 1248), is most significant. The majority thereby recognizes that the severance theretofore granted Darcy was rendered worthless, when his trial was proceeded with only three days after that of Foster and Zeitz.

As stated by Biggs, Chief Judge, in his dissent:

> "Under the circumstances a change of venue or a delay in putting Darcy on trial was requisite to fairness", (R. 1266).

The only reason that can be attributed for the sudden rescheduling of the Darcy trial is that the Bucks County

Court, during the Foster-Zeitz trial, came to the conclusion that public prejudice against all defendants was such that death penalties could be secured. The overwhelming weight of evidence is that Darcy's case was originally scheduled for the term following the Foster-Zeitz trial, and then was suddenly advanced to follow immediately thereafter.

The newspaper reports of the prospective dates of the respective trials were never repudiated by the District attorney's office. All newspaper reports prior to June 4, 1948, are consistent in stating that the cases of petitioner and Capone would be tried at a later term of court, (Rel. Ex. 51; R. 1007a; Rel. Ex. 55; R. 1009a; Rel. Ex. 64; R. 1034a; Rel. Ex. 65; R. 1038a; Rel. Ex. 70; R. 1049a).

It is most significant that the *first date* the newspapers reported that the Darcy trial was to start, immediately after the close of the Foster-Zeitz trial, was in the Intelligencer issue of Friday, June 4, 1948, (Rel. Ex. 76; R. 1066a). It is only natural to infer that the only reason for the change in plans was that the District Attorney's office on Friday, June 4, 1948, was convinced that it had the Bucks Countians in a convicting and "electric chair" frame of mind, and that it would be expedient to dispose of the Darcy case at once, before the atmosphere of hysteria and prejudice and public indignation died.

Another reason for the sudden rescheduling of petitioner's trial is that the District Attorney's office knew that the jury panel, from which petitioner's jury was to be selected, had been present in the court house during the Foster-Zeitz trial and, therefore, had the opportunity to listen to or hear of the details of the Feasterville holdup. The Bucks County Criminal Court records clearly show that on June 1, 1948, the traverse jurors summoned to appear on that date: "All answered to their names but the following * * *", (R. 952a), and then there are listed the names of 40 jurors who did not then answer for service, (Rel. Ex. 10 (c) and (d); R. 948a-

952a). It is admitted that talesman Slaughter was present during several sessions of the Foster-Zeitz trial. (R. 1143a-1144a).

The analysis of the voir dire examination of the jurors who served in petitioner's case and were asked the questions shows that 89% of those asked admitted that they had read pertinent newspaper articles, 50% of those asked admitted that they had discussed the case, and 30% of those asked, or *one out of every three*, admitted that they had fixed opinions and were excused by the trial judge because they had formed opinions which they could not change. (Brief p. 36). This analysis shows an increase of 26% over the number of jurors in the Foster-Zeitz case, who had been asked whether they had read pertinent newspaper articles and admitted that they had, a 10% increase over the number of Foster-Zeitz jurors, who had been asked whether they had fixed opinions and admitted that they had.

This case falls within the evils of public prejudice and hysteria discussed in *Commonwealth v. Karmendi*, 328 Pa. 321, (339). There, of the 39 prospective jurors on the regular panel, 11 were excused because they had formed opinions which they could not change. Of 41 talesmen who were examined before the jury was completed, 13 were excused for the same reason. Approximately one-third of the jurors called to try the defendant stood up in open court and said they had fixed opinions derived from reading the newspapers and hearing the case discussed which they could not and would not change.

Justice Drew, commenting thereon, stated at page 339:

> "The examination of the testimony taken on voir dire *reveals a remarkable fixity of opinion; the crystallization of public sentiment is apparent*". (Italics supplied).

In view of the pressure to try the Darcy case immediately after the Foster-Zeitz case had closed with the electric chair penalty, and while the newspaper and radio publicity and public indignation were still fresh in the minds of Bucks Countians, there could be no question but that the verdict in the petitioner's case was a foregone conclusion and that he was already prejudged. All the circumstances leave but one inference: that is, when petitioner's trial started on Monday, June 7, the prevailing opinion in Bucks County was that "Darcy is guilty and he must receive the electric chair."

The conclusion of the majority of the Court of Appeals condemns petitioner for his trial counsel's failure to move for change of venue or continuance, although in its previous per curiam opinion, (203 F. 2d 407, 409), it had sustained the action of the District Court in denying the petition for habeas corpus, based on the objection, that Darcy was deprived of due process by reason of the lack of effective assistance of counsel.

Neither of the decisions cited by the Court of Appeals, as authority for its position that significance must be attached to the fact that at no time did petitioner ask for a change of venue, is applicable: *Stroble v. California*, 343 U. S. 181, (1952); *United States v. Rosenberg* (C. A. 2), 200 F. 2d 666, (1952).

First, the petitioner was not permitted to explain that he himself had not waived the right to ask for a change of venue, or for a continuance because the Court of Appeals in its earlier decision, (203 F. 2d 407, 409), had excluded any testimony showing the lack of effective assistance of counsel. Secondly, in the *Stroble* case more than two (2) months elapsed between the alleged inflammatory newspaper articles and the date of the trial, and in the *Rosenberg* case there were no news items whatsoever concerning the pending prosecution between November, 1950, and

February 21, 1951, the date of the trial,—a period of three (3) months.

In any event, as stated in the *Stroble* case, (at 193-194), "*petitioner's failure to make such a motion was not dispositive of the issue here.*"

In the Darcy case, the trial started only two (2) days after two (2) weeks continuous publication of inflammatory newspaper articles about the Foster-Zeitz trial, wherein Darcy's name was daily mentioned. The publication of the news of the Foster-Zeitz trial for two (2) weeks immediately preceding Darcy's trial prejudiced the jury in arriving at their verdict.

The newspaper accounts of his companions' trial rekindled public prejudice in his case and aroused to an even higher degree such prejudice in the community that petitioner's trial was "fatally infected" with an absence of "that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U. S. 219, 236; (1941).

Nevertheless, the majority of the Court of Appeals have concluded that: "The situation certainly would have justified a decision to wait a while before trying the relator, or else to try him in another community if trial immediately after the conviction of his confederates was deemed important. We may be persuaded that in the circumstances *it would have been wise to take such precautions*, * * *", (R. 1248). (Italics Supplied.) In its opinion, the majority further commented as to petitioner's original counsel: "And he did not at any time ask for a change of venue", (R. 1247).

The Court of Appeals' findings and conclusions, relative to the issue of effective assistance of counsel, are, to say the least, contradictory and inconsistent.

In its earlier opinion, the Court of Appeals excluded any proof in support of the petitioner's contention as to lack of effective assistance of counsel. Now, in attempting to justify their conclusion that petitioner received a fair and

impartial trial, the majority of the Court of Appeals state that the trial counsel "* * * was sufficiently satisfied with the responses of these veniremen * * *. And he did not at any time ask for a change of venue", (R. 1247).

The petitioner should not be penalized for his trial counsel's failure to request a change of venue or continuance and the trial court sua sponte should have granted such change in time or place.

If, however, the failure of the petitioner's trial counsel to act becomes essential and controlling, then the petitioner should have been permitted to offer testimony in regard to such lack of effective assistance of counsel.

It is, therefore submitted that the trial of petitioner, which started in an atmosphere of prejudice and hysteria that had reached its climax during the Foster-Zeitz trial, was but a sham and a farce and constituted a denial of due process of law.

III.

The "extraordinary and unprecedented conduct" of Judge Boyer, a judge other than the trial judge in petitioner's trial, who acted as an "overseer judge" and judicial aid to the district attorney and was "known" by the jury as "hostile" to petitioner, deprived petitioner of a possible unprejudiced determination as to the penalty to be imposed—whether death or life—and, therefore, violated the due process clause of the Fourteenth Amendment.

A.

The Recognition by the Majority of the Court of Appeals, that Judge Boyer's Conduct Amounted to a "Rather Striking Manifestation of Extraordinary Interest in the Proceedings" and, also, that the Jury Identified him as "Hostile" to Darcy, Established that Judge Boyer "Had Done Something Prejudicial" to Petitioner, Resulting in a Denial of Due Process.

Under Pennsylvania law, the jury fixes the penalty in first degree murder cases—death or life imprisonment, (18 Purdon's Penna. Statutes Annotated, Section 4701).

Judge Boyer's extraordinary and unusual manifestation of interest and active partisan participation in petitioner's trial had a terrific impact on the jury's fixing Darcy's penalty at death, rather than at life imprisonment.

The majority opinion of the Court of Appeals squarely recognizes the fact that Judge Boyer showed an extraordinary and unusual interest in Darcy's trial. The uncontradicted facts of Judge Boyer's presence and participation were so obvious that they could not be and were not overlooked by the majority.

Obviously, the reason for the indelible impression made upon the majority by Judge Boyer's role in this case was that it was most unusual and extraordinary for another judge to be so actively present—let alone participate—in a trial, in which he did not preside. Nowhere in the records has there been found another example of a "*two-judge*" bench in a criminal or civil trial.

If the fact of Judge Boyer's "extraordinary interest" in Darcy's case made such a lasting impression upon the majority as set forth in the Opinion, then the tremendous impact of his presence and participation must have made an even more effective impression upon the minds of the jurors in the Darcy case.

The effect of the impact of Judge Boyer's role in this case upon the jurors is that his hostile attitude against Darcy was the decisive force in the determination by the jurors of the only issue left to them under Judge Keller's charge—whether to impose imprisonment for life or death as the penalty in this first degree murder case, as provided under Pennsylvania law, (18 Purdon's Penna. Statutes Annotated, Section 4701).

Judge Boyer's conduct in the Darcy trial is most ably analyzed by Kalodner, Circuit Judge, in his dissenting opinion, (R. 1251-1265).

The majority of the Court of Appeals has, at least by inference, recognized that Judge Boyer's conduct during the Darcy trial was a "dubious occurrence" in State procedure which they would proscribe if it should have happened in a Federal Court, (R. 1250).

However, this is not the test as to whether or not there has been a violation of the due process guarantee, as set forth in *Betts vs. Brady*, 316 U. S. 455, (1942), *Johnson v. Zerbst*, 304 U. S. 458, (1938), and *Rochin v. California*, 342 U. S. 165, 172, (1952).

The test as stated in *Chambers v. Florida*, 309 U. S. 227 (1940) is:

> "* * * No man's life, liberty or property, (can) be forfeited as criminal punishment * * * until there has been a charge fairly made and fairly tried in a public tribunal *free* of prejudice, passion, excitement and *tyrannical power*", (pp. 236-237).

Upon consideration of the "totality of facts", evidenced by the majority of the Court of Appeals' admitted factual findings as to Judge Boyer's conduct in the Darcy trial, it is obvious that the petitioner's trial was offensive to the common and fundamental ideas of fairness and righteousness and that his conviction was in violation of the due process clause of the Fourteenth Amendment.

(a)

JUDGE BOYER'S PERSONAL FEELING OF PREJUDICE AGAINST PETITIONER AND COMPANIONS.

Judge Boyer, by his conduct and by his statements in court, evinced a personal antagonism and indignation against the boys from Philadelphia who had made raids into Bucks County. The first expression of his sentiments is found in the Intelligencer issue of March 1, 1948, when both Judges expressed their objection to separate trials, (Rel. Ex. 43; R. 1000a). This statement shows a deliberate attempt to hurry the trial of these homicide cases.

Thereafter, after the Foster-Zeitz jury returned its verdict of guilty of first degree murder, with the death penalty, the Intelligencer issue of June 5, 1948, (Rel. Ex. 78; R. 1071a-1072a), appeared with the following frontpage quotation:

> "JUDGE BOYER PRAISES JURY FOR VERDICT CONDEMNING 2 KILLERS TO THE ELECTRIC CHAIR."

He was reported therein as having told the Jury:

> "I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge these days.
>
> "The only hope of stemming the tide of such crimes by youths is to enforce the law, which you have indicated by your decision", (R. 1071a, R. 1072a).

Apparently the jury's decision to impose the death penalty expressed Judge Boyer's personal sentiments against all the defendants. However, the public expression of such personal feelings by Judge Boyer, reported two days before Darcy's trial, necessarily was circulated and broadcast throughout Bucks County.

During the very period in which Darcy was being tried, Judge Boyer in another case publicly expressed his antagonism against Philadelphians, who came to Bucks County to commit crimes. In the Intelligencer issue of June 12, 1948, (Rel. Ex. 94; R. 1094a-1095a), there appears the following frontpage headline:

> "Judge Boyer Warns that Bucks County is Tired of Thieves from Phila." * * *

Judge Boyer was quoted therein as publicly stating:

> "Asserting that 'We don't propose to nail all our property fast here in Bucks county just because thieves from Philadelphia want to pick up everything which isn't being watched,' Judge Calvin S. Boyer, who sentenced an 18-year-old youth to prison yesterday, asked, 'What business did you have to come up here in the first place?' "
>
> * * *

"'We in Bucks county are tired of you Philadelphians who don't know how to behave. We have to bear the expense and we propose to stop it,' Judge Boyer said." (R. 1094a-1095a).

Bucks County is a small rural county in Pennsylvania. Its two principal newspapers, the Doylestown Daily Intelligencer and Bristol Courier, are jointly owned and controlled and, together with the Philadelphia newspapers, were circulated throughout the county. Judge Boyer's personal views and feelings were thus circulated and broadcast throughout Bucks County. It must be inferred that Bucks Countians were aware of Judge Boyer's personal feelings. After all, his feelings reflected the personal indignation of practically *one out of every three* adults in that county. Therefore, when Judge Boyer even appeared in the courtroom of Judge Keller during the petitioner's trial, it was ipso facto a constant reminder to all Bucks Countians that Judge Boyer had publicly praised the Foster-Zeitz jury and had shown his expressed personal antagonism against Philadelphians, who made criminal forays into Bucks County.

The majority of the Court of Appeals recognized that, under the circumstances existing at the end of the Foster-Zeitz trial:

"The situation certainly would have justified a decision to wait awhile before trying the relator or else to try him in another community if trial immediately after the conviction of his confederates was deemed important * * *", (R. 1248).

Three days later, *on the very first day of the first session of the Court immediately thereafter,* Darcy was placed on trial in the same Bucks County Courthouse in spite of the fact that he had previously been granted a severance.

The factual findings of the majority of the Court of Appeals, in regard to the presence of Judge Boyer in the court room during Darcy's trial, are concisely summarized by Judge Kalodner, in his dissenting opinion, (R. 1251-1265), as follows:

> "It may be well at this point to avert to the factual findings which the majority made on the score of Judge Boyer's presence in the courtroom during Darcy's trial.
>
> "Judge Boyer had presided at the trial of Darcy's two confederates which terminated * * * with a verdict of guilty and the imposition of death sentences by the jury."
>
> * * *
>
> "Honorable Calvin Boyer was much in and about the courtroom during the course of this trial * * *.
>
> "* * * every day of this trial Judge Boyer spent some time, on occasions several hours, in the courtroom. He even attended an evening session.
>
> "At times during the trial Judge Boyer joined Judge Keller on the bench for whispered consultations within view of the jury, although there is nothing to suggest that the jury could hear what was being said.
>
> "* * * at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling.
>
> "* * * during Judge Keller's charge to the jury, Judge Boyer sat facing the jurors within the enclosure reserved for members of the bar * * *.
>
> "* * * the jurors knew who Judge Boyer was. The evidence also makes it very probable that they also knew that he had just completed the trial at which relator's (Darcy's) co-defendants had been convicted and sentenced to death. Moreover it had been reported in the press that Judge Boyer had commended the jury for

the first degree verdict against the co-defendants with its mandatory death penalty."

"There was a rather striking manifestation of extraordinary interest in the (trial) proceedings by Judge Boyer."

"It had come to the jury's observation that a judge (Judge Boyer) other than the trial judge was showing much interest in the case", (R. 1253-1254).

The effect of Judge Boyer's presence and conduct in the Darcy trial, viewed in the light of the majority of the Court of Appeals' factual findings, constituted a fundamental unfairness proscribed by the due process guarantee.

Judge Boyer was well known in Bucks County; he had presided over the Foster-Zeitz trial; he had commended the Foster-Zeitz death verdict; he had publicly expressed his antagonism against outsiders (Robert White incident); and three days after the Foster-Zeitz verdict, when Darcy was placed on trial in the same Court, Judge Boyer was in attendance, *beginning with the very first session on the first day*, and participated as much as if he had been the trial judge. The undisputed fact that he was present and showed an "extraordinary interest" in the Darcy trial and that he had a hostile attitude towards "outsiders," necessarily effectively influenced and guided the jurors' imposition of the death sentence.

As stated by Judge Kalodner, Judge Boyer's presence and manifest interest of themselves raised a substantial due process question, principally because the jurors identified him as an official who was hostile to Darcy:

"I believe that if the *jurors identified Judge Boyer as an official who was hostile to Darcy*, such identification in and of itself raised a due process question which must be resolved in favor of Darcy, because a 'hostile' attitude of a judge can, and almost universally

does, effectively influence and guide the jury's verdict", (R. 1254).

* * *

"The United States Supreme Court, the Supreme Court of Pennsylvania and other appellate courts, have time and again emphasized the existence of this significant judge-jury relationship", (R. 1255).

See *Starr vs. United States*, 153 U. S. 614, 626 (1894); *Quercia vs. United States*, 289 U. S. 466, 470 (1933); *Commonwealth vs. Myma*, 278 Pa. 505, 508 (1924); *United States vs. Link* (C. A. 3), 202 F. 2d 592, 595 (1953); *United States vs. Brandt* (C. A. 2), 196 F. 2d 653, 656 (1952).

B.

Judge Boyer's Active Participation in Petitioner's Trial and, Particularly, His (a) Having Made a Ruling Therein, and (b) Having Passed a Note to the District Attorney During the Court's Charge Amounted to a Silent But Eloquent Extra-judicial Aid to the Prosecutor and "To Such Improper Partisan Participation by Judge Boyer in the Trial" as to Constitute a Denial of Due Process.

The record clearly shows that Judge Boyer actively participated in petitioner's trial. The majority opinion of the Court of Appeals recognized that at times he joined Judge Keller on the bench for "*whispered consultations within the view of the jury*" and that "at least one such consultation was designed for the guidance of Judge Keller in the making of a trial ruling." And that he, in effect and in fact, "sat" on the bench with Judge Keller during the course of the trial.

(a)

JUDGE BOYER DID ACTIVELY PARTICIPATE IN DARCY'S TRIAL, WHEN HE ASSISTED IN RULING ON ADMISSION IN EVIDENCE.

During a side bar discussion out of the hearing of the jury, shortly after court convened on Saturday morning, June 12, a difficult question of law arose on the admissibility of evidence of other offenses, (R. 1144a-1146a), in view of the Pennsylvania Act of July 3, 1947, P. L. 1239, (19 Purdon's Penna. Statutes Annotated, Section 711).

This question was a very vital one, for, if the ruling were favorable to the Commonwealth, the jury would have for its consideration Darcy's written admissions of other hold-ups in which he had participated. With such confession before it, the Darcy jury would be more easily persuaded to dispense with any leniency toward the petitioner. As a matter of timing, the ruling on this evidence was also important, because the Commonwealth closed its case shortly thereafter.

Judge Boyer's participation in the ruling, although out of the hearing of the jury, could not help but be noticed by the jurors. The District Court's finding that Judge Boyer left the bench shortly thereafter and did not return during the remainder of the trial is meaningless because the introduction of evidence ended shortly thereafter.

(b)

NOTE PASSING INCIDENT ESTABLISHES IMPROPER PARTICIPATION BY JUDGE BOYER IN THE DARCY TRIAL.

Miss Marian Ford, Joseph Darcy and Miss Margaret Gordon, witnesses called by the petitioner, had testified in

substance that at the conclusion of his charge in the petitioner's case, Judge Keller had inquired of counsel whether he had omitted anything or if there were any corrections. They testified that Mr. Achey, defendant's counsel, indicated he had no objections or corrections and that Judge Keller thereupon proceeded to conclude his charge to the jury. Each of these witnesses testified that Mr. Biester, who was then seated next to Judge Boyer opposite the jury box, received a note from Judge Boyer, read it, stepped to the front of the bench and interposed objections to the Court's Charge, (R. 481a-483a; R. 484a; R. 542a-544a; R. 631a-615a).

Excerpts from the Transcript of Trial of *Commonwealth v. Darcy*, with reference to Judge Keller's charge and the objection of District Attorney Biester, appear in the Record at R. 1146a-1150a.

The *time element* intervening between Judge Keller's request for corrections and suggestions and Mr. Biester's objection, (R. 1148a-1149a), corroborates the testimony of petitioner's three witnesses as to the passing of the note from Judge Boyer to Mr. Biester.

Mr. Biester claimed that he decided to make the objection "immediately after Judge Keller made his statement which I was not in accord with", (R. 914a). The statement made by Judge Keller immediately before the objection was made had nothing to do with the subject matter of the objection. The subject matter of the objection, (R. 1148a),—relative to the issue of flight—had been mentioned by Judge Keller long before the conclusion of his charge.

Mr. Biester's objection was:

> "MR. BIESTER: Your Honor, I may have misunderstood part of your charge, but I thought that you said that if the shooting of Kelly was unintentional, that would be murder of the second degree; that if it were during the flight from the crime it would be murder in the first degree.

THE COURT: I specifically stated it was completely abandoned in the case of flight or escape. That becomes important only; members of the jury, if you are convinced beyond a reasonable doubt, that this shooting of Kelly did not occur during the perpetration of a robbery", (R. 1149a).

The testimony of the respondents' witnesses in denial of the testimony of Miss Ford, Joseph Darcy, and Miss Gordon, is equivocal and cannot constitute a contradiction thereof.

Mr. Biester testified that he had "*No recollection whatsoever*" that "during the charge a note was written and passed by Judge Boyer" to him, (R. 877a-878a). He did not specifically deny that such note was written and passed by Judge Boyer to him during Judge Keller's charge in petitioner's trial, although the present petition for writ of habeas corpus raising this very issue was filed in the District Court on April 3, 1951, and subsequently the subject of argument before the Court of Appeals. More than two years intervened between the date of the first argument before the Court of Appeals and March 20, 1954 when he so testified that he had "no recollection whatsoever", (R. 878a).

If the incident had not occurred Mr. Biester, who was District Attorney and is now a Judge, certainly was informed enough about the rules of evidence to know that the note passing either occurred or did not occur. Later, he testified: "But I do not recall having received the note, or any relation between my arising and the reception of the note", (R. 878a; R. 911a-914a).

Mr. Curtin, then Assistant District Attorney, testified that he had "Absolutely no recollection of any note being handed to Judge—to District Attorney Biester at any time during the Charge of the Court" at the petitioner's trial,

(R. 733a). He did not specifically deny that such a note was written and passed by Judge Boyer to Mr. Biester during Judge Keller's charge.

The majority of the Court of Appeals recognizes that the note-passing incident would have been considered "*such improper partisan participation by Judge Boyer in the trial*," as to come within reach of the due process clause, had the incident been established by the evidence.

The conclusion of the majority of the Court of Appeals, with reference to this incident, is based upon an anomalous finding: that while "the Government's showing (that it had not occurred) was less than overwhelming. Yet it was not unsubstantial," and since "the District Court made a specific finding that this alleged occurrence did not take place. * * * we think that we are not justified in disturbing that finding", (R. 1250).

As opposed to the direct testimony of three witnesses for Darcy that during Judge Keller's charge Judge Boyer sat in his "*special chair*" in the front of the court room, *directly facing and about twenty-three feet away from the jury*, with Mr. Biester seated nearby, that Judge Boyer passed a note to Mr. Biester who *thereupon* arose and interposed an objection to a point in Judge Keller's charge, we have the "*no recollection*" *testimony* of Mr. Biester, the District Attorney, (R. 876a-878a, R. 884a) and his assistant, Mr. Curtin, (R. 731a-733a, R. 739a).

Where a man's life is at stake, as in the instant case, such "no recollection" testimony as given by Mr. Biester and Mr. Curtin cannot and should not be regarded as a "substantial" basis for a finding of fact such as was made by the District Court in this case. Certainly, trial attorneys with the experience of Mr. Biester and Mr. Curtin should have known whether such an incident had or had not occurred.

It is uncontradicted that the District Attorney and his assistant testified that, during Judge Keller's charge to the

jury, *they had left their customary places at the Commonwealth table*, close to the bench and only four feet from the jury, and sat in chairs at the press table, which were on the opposite side of the court room some fifteen feet distant from the jury and some eight feet from Judge Boyer's "special chair." This admitted circumstance corroborated the testimony of the petitioner's three witnesses as to this incident having occurred.

Further, it must be pointed out that the objection raised to the Court's charge by Mr. Biester was one that an experienced trial attorney would have raised immediately upon Judge Keller's having asked for suggestions or corrections at the close of his charge. The time element, elapsing between Judge Keller's requests for corrections or suggestions and Mr. Biester's interposing his objection, corroborates petitioner's contention that the matter was brought to Mr. Biester's attention by the note-passing to him by Judge Boyer.

Certainly, Judge Boyer's extraordinary and unprecedented conduct has never been duplicated in any other criminal trial in Pennsylvania Courts. It was and is not customary, in normal procedure in a Pennsylvania criminal trial, to have virtually a *"two-judge" bench*. Judge Boyer's presence and conduct had such a lasting and compelling impact and impression upon the jury as to take it out of the category of "state procedure" and to bring it within the protection of the due process guarantee of the Fourteenth Amendment.

Chief Judge Biggs, in his dissenting opinion, characterizes the conduct of Judge Boyer in connection with Darcy's trial, (R. 1266), as follows:

> "Judge Boyer's preoccupation with Darcy's trial was intense. * * *. From his repeated visits to and his behavior in the courtroom, the members of the Darcy jury, with reason, could have inferred that he desired to indicate his belief and his desire that Darcy, like

Foster and Zeitz, should be found guilty, and that the penalty of death should be imposed upon him by the jury: that such was the belief and the desire of the judicial authorities of Bucks County. Though in theory a judge does not control the decisions of juries, judicial attitudes have great influence on jurors. *Fairness cannot condone Judge Boyer's conduct*".

"*The foregoing amounts to a denial of due process*" (R. 1266).

Judge Kalodner, in his dissenting opinion, appraises Judge Boyer's unprecedented interest in Darcy's case, (R. 1264), as follows:

"Judge Boyer's extraordinary and unprecedented conduct was totally foreign in every respect to the normal procedural course of a criminal trial in the Pennsylvania courts. It was not in any sense within the periphery of what may be described as the customary and normal procedure in Pennsylvania criminal trials. Its significance in its compelling impact upon the jury was of such proportion and vitality as to take it out of the category of 'state procedure'."

"It is not incidental to any accepted standard of state procedure for a judge to conduct himself as Judge Boyer did in the Darcy trial. It is not incidental in Pennsylvania for a judge who has just completed a trial of a defendant's confederates and praised the jury which found them guilty and fixed death as their penalty, to participate, as Judge Boyer did, in the trial of a third confederate, presided over by the president judge of his court. It is not incidental for a judge to have a 'special chair' placed for his use on the front row of the courtroom where he is in full view of the jury and it is within his full view and for him to sit there as an extra-curricular judicial overseer."

"And it is not incidental in Pennsylvania criminal

trials for a judge to pass a note to the district attorney."

"In my opinion it can fairly be said of Judge Boyer's conduct that *'This is conduct that shocks the conscience' in violation of the due process guarantee*".

"Its inevitable effect was to distort the trial process to the extent at least that Darcy was deprived of a possible unprejudiced jury determination that justice required only the imposition of a life sentence instead of death", (R. 1264).

IV.

Conclusion of argument.

The inescapable conclusion is that this petitioner was prejudged as guilty as a result of the prejudicial influences outside and inside the courtroom resulting from the trial being so highly publicized and from the "overseer judge's" unprecedented interest and participation in the petitioner's trial. As stated in *Shepherd vs. Florida*, 341 U. S. 50, 51 (1951),

"* * * The trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated * * *."

The prejudicial newspaper articles and editorials, as reflected in the public opinion against the petitioner and his companions, aroused prejudice against petitioner in Bucks County, and that his trial was "vitally affected" with an absence of that fundamental fairness essential to the very concept of justice. The out-of-court campaign to convict petitioner did not abate soon after the commission of the crime. On the contrary, it was kept alive and brought to a

burning climax during the Foster-Zeitz trial. These newspaper accounts aroused such prejudice against him in Bucks County as to prevent necessarily a fair trial. It was uncontradicted that the inflammatory newspaper accounts and editorials appeared almost daily for two weeks preceding petitioner's trial.

When one analyzes the voir dire examination of the jurors in petitioner's trial and finds that almost *one out of every three jurors*, who was *asked* the question, *answered* that he had a fixed opinion, the conclusion is inescapable that the petitioner was wholly prejudged as guilty and doomed to the death penalty before his trial even started.

When petitioner's trial started immediately *on the next court day* after the jury in his companions' case had fixed the penalty of death, in a community inflamed by prejudice and passion against "out'anders", before a "two-judge bench" by a district attorney assisted by the "overseer judge" on that bench, then such trial was, in the words of Mr. Justice Holmes, "*a mask*": *Moore vs. Dempsey*, 261 U. S. 86, 91. The petitioner's conviction, under such circumstances, did not meet any civilized conception of due process of law.

WHEREFORE, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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February 16, 1956.

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1955
No. 323

UNITED STATES OF AMERICA ex rel. DAVID DARCY,

Petitioner

v.

EARL D. HANDY, Warden of Bucks County Prison, DR. FRED S. BALDI, Warden of the Western State Penitentiary, and CARL H. FLECKENSTINE, United States Marshal for the Middle District of Pennsylvania,

Respondents

BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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1.

OPINIONS BELOW

In addition to the opinions below set forth by petitioner, other opinions and orders relating to the instant case are reported as follows:

1. The opinion of the Supreme Court of Pennsylvania, affirming the judgment and sentence imposed upon petitioner is reported at 362 Pa. 259, 66 A. 2d 663 (1949); cert. den., 338 U.S. 862 (October 24, 1949).

2. The order of the Supreme Court of Pennsylvania, denying a petition for writ of habeas corpus to petitioner at No. 9 Miscellaneous Docket 268 is not reported; cert. den., 338 U.S. 862 (October 24, 1949).

3. The opinion of the Supreme Court of Pennsylvania, denying a petition for writ of habeas corpus to petitioner at No. 9 Miscellaneous Docket 431 is reported at 367 Pa. 130, 79 A. 2d 585 (April 9, 1951); cert. den., 342 U.S. 837 (October 8, 1951).

2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of Pennsylvania

Article I, Section 9.

> "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, *a speedy public trial by an impartial jury of the vicinage;* he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." (Emphasis supplied)

Pennsylvania Statute

The act of June 24, 1939, P. L. 872, Section 701, 18 Purdon's Penna. Statutes Annotated, Section 4701.

> "All murder * * * which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree * * * The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty

thereof, ascertain in their verdict whether the person is guilty of murder of the first or second degree. . . .

"Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. . . ."

3.

QUESTIONS PRESENTED FOR REVIEW

1. In a trial by jury, where a defendant is represented by experienced counsel of his own choosing and no motion is made either for a change of venue or a continuance and evidence that such defendant participated in a robbery and murder is uncontradicted, is such defendant denied due process of law by reason of certain newspaper stories, reporting the murder, and isolated oral comments not oriented as to time, place or person condemning his deed, where the jurors upon extensive voir dire examination state under oath that they will render a verdict under the evidence, and where there is no evidence of any influence having been exerted on such jurors and where the evidence is uncontradicted that the trial was conducted in a calm judicial atmosphere unmarred by any public demonstrations or other manifestation of hysteria and prejudice?

2. In a murder case where the trial record discloses that one judge assists the presiding judge out of the hearing of the jury on one ruling of evidence which ruling is not prejudicial to the defendant and where neither the ruling nor the participation of said judge is questioned on direct appeal, is a defendant denied due process because a newspaper reports that said judge who presided at the trial of the defendant's co-conspirators, commended the jury for its verdict under the evidence and where the said judge appeared

on the bench during the defendant's trial for short periods to transact other business prior to the daily beginning of defendant's trial and on other occasion attended the defendant's trial in street clothes as a spectator, but where there is no evidence that the jury trying defendant was in any way influenced by his presence or alleged commendation?

4.

STATEMENT OF THE CASE

I.

HISTORY OF THE CASE

(a) *Facts Concerning the Crime.*

The facts concerning the crime for which petitioner was tried, found guilty and sentenced to death are best set forth in the opinion of the District Court (R. 1201a-1203a) as follows:[1]

> "About 11:25 P. M., December 22, 1947, David Darcy, 22, Harold Foster, 23, Harry Zeitz, 18, and Felix Capone, 16, arrived at the Feasterville Tavern located at the junction of Churchville-Newtown-Bustleton Roads, in the Village of Feasterville, Lower Southampton Township, Bucks County, Pennsylvania. Darcy, Foster and Zeitz, each armed with a revolver, entered the tavern while Capone acted as a 'lookout' in an automobile parked nearby with the engine running for a quick getaway. During the course of the

[1] The facts of the crime as found by the District Court amplify, but in no way differ from the facts as stated in the opinion of the Supreme Court of Pennsylvania on direct appeal (*Commonwealth v. Darcy*, 362 Pa. 259, 261-263, 66 A. 2d 663, 1949). Footnotes to the District Court's opinion have been omitted.

robbery Darcy fired two shots and then engaged in a scuffle with Allen Hellerman and Edward Wunsch. During the scuffle, Darcy, Zeitz and Foster fired shots. Hellerman fell to the floor, shot in the base of the neck and paralyzed in both lower extremities. Two shots struck Wunsch causing arm and shoulder injuries. After taking the money from the cash register, Foster demanded that everyone produce their wallets. Darcy said he felt 'like shooting someone', and again, 'Where is the police? I feel like shooting some of them.' N. T. T. 304. Darcy then threatened several patrons with his gun, lined them up against the wall with their hands up and demanded their watches. While Foster was 'covering' those present, Darcy and Zeitz reloaded their guns. After robbing the proprietor and some 18 patrons, with Hellerman lying on the floor 'apparently dead' they fired shots into the mouthpieces of the telephone, warned those present not to move for a long time, and departed, Foster returning momentarily as a warning and to wish them all a 'Merry Christmas.'

"Meanwhile, a Mrs. Leutwyler got out a rear door, ran across the road to the Buck Hotel and gave the alarm. At the hotel she found the bartender and two other persons, William Kelly and Frank J. Walter. They followed her outside and stood at the road intersection. While there Horace Patterson, a friend of Kelly, drove out of Churchville Road and stopped to talk with him and Walter. They noticed the automobile, with the engine running, standing in front of the

Feasterville Tavern headed toward Newtown. Darey, Foster and Zeitz ran from the tavern, got into the car and started off with Zeitz at the wheel. Just then, one of Zeitz' companions said: 'Someone is coming out the door.' Zeitz fired two shots, from a gun held in his left hand, from the front window of the driver's side in the direction of Kelly who was then some ten or twenty feet away. One of the bullets struck Kelly in the back of the head causing his death within two days.

"A half hour after Zeitz fired the shots, Darey and his three companions committed another armed robbery of the proprietor and three or four patrons of the Deacon Inn near Penndel, eight miles away from the Feasterville Tavern. Darey said, 'Stop the fooling around. This is a stickup. We just killed a couple of guys.' N. T.-T. 685. Capone, with gun in hand, said, 'You guys ought to try this sometime, it's fun.' N. T.-T. 688. Three shots were fired, two of them into the telephone booth; no one was injured. Upon their return to Philadelphia at 1:17 A.M. December 23, 1947, they were apprehended by Philadelphia police."

(b) *History of Direct and Collateral Proceedings.*

Following the denial of a motion for a new trial by the Court of Oyer and Terminer of Bucks County, Pennsylvania, an appeal was taken by petitioner to the Supreme Court of Pennsylvania at No. 136 January Term, 1949. The judgment and sentence were affirmed, opinion reported *sub nom Commonwealth v.*

Darcy, 362 Pa. 259, 66 A. 2d 663 (May 26, 1949), cert. den., 338 U.S. 862 (October 24, 1949). Prior to the refusal of this Court to review the judgment of the Supreme Court of Pennsylvania at No. 136 January Term, 1949, petitioner, on August 1, 1949, filed a petition for writ of habeas corpus in the Supreme Court of Pennsylvania at No. 9 Miscellaneous Docket 268 which was refused, without opinion, cert. den., 338 U.S. 862 (October 24, 1949), (R. 1195a).

A petition for reargument of the direct appeal in the Supreme Court of Pennsylvania at No. 136 January Term, 1949, was presented to that Court on April 2, 1951; at No. 9 Miscellaneous Docket 429 and refused, without opinion, the following day—April 3, 1951 (R. 1196a). Petitioner did not seek certiorari from this Court. Instead, on the same day, April 3, 1951, a petition for writ of habeas corpus was presented to the United States District Court for the Middle District of Pennsylvania (R. 5a-15a). A rule to show cause issued returnable April 5, 1951, and a stay of execution of the sentence ordered pending determination of the rule (R. 1a). After preliminary oral argument, the application was continued to April 10, 1951, to enable petitioner to present a petition for a writ of habeas corpus to the Supreme Court of Pennsylvania (R. 1a, 1196a). Such a petition was filed in that Court at No. 9 Miscellaneous Docket 431 challenging the constitutional validity of the judgment and sentence *on the same grounds as alleged in the petition in the District Court*. This petition was refused, opinion reported *sub nom Commonwealth ex rel. Darcy v. Claudy*, 367 Pa. 139, 79 A. 2d 585 (April 10, 1951), cert. den., 342 U.S. 837 (October 8, 1951).

On April 11, 1951, the District Court dismissed the petition, opinion reported at 97 F. Supp. 932. On appeal, the Court of Appeals for the Third Circuit remanded the case for hearing on certain allegations contained in the petition (*United States ex rel. Darcy v. Handy*, 203 F. 2d 407).[2]

Upon remand, the District Court, on February 12, 1955, denied the petition for writ of habeas corpus, opinion reported at 130 F. Supp. 270 (R. 1191a-1244a). The Court of Appeals affirmed the judgment of the District Court, opinion reported at 224 F. 2d 504 (R. 1245a-1266a).

This Court, on October 24, 1955, granted certiorari (R. 1269a).

II.

STATEMENT OF FACTS

(a) *Summary of Petitioner's Allegations.*

The allegations of the petition for writ of habeas corpus are:

(1) Petitioner was *forced* to go to trial the week following the trial of his co-conspirators, Foster and Zeitz who each were found guilty of murder of the first degree by a jury which fixed the penalty at death for both (R. 9a).

(2) Upon receiving the verdict in the Foster-Zeitz case, the trial judge, Calvin S. Boyer, commended the

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[2] After denial of rehearing by the Court of Appeals this Court denied certiorari on October 26, 1953 (346 U.S. 865).

jury upon its verdict and the commendation was carried in a local newspaper, viz., "The Doylestown Daily Intelligencer" (R. 8a).

(3) Hysteria and prejudice swept the county as the *result* of the Foster-Zeitz trial and verdict and was so general "as to influence [petitioner] to a slight degree" the jury *panel* from which the Darcy jury was selected (R. 8a).

(4) The Darcy jurors were familiar with (a) what had transpired at the Foster-Zeitz trial, (b) petitioner's connection therewith, (c) Judge Boyer's utterances and (d) public and news-paper comments thereon (R. 9a).

(5) During the petitioner's trial, Judge Boyer appeared in the court room, in view of the jurors, and "at times" assisted and conferred with Judge Keller in the conduct of the trial and his presence reminded the Darcy jurors of the Foster-Zeitz trial and the Judge's comments on the verdict thereof (R. 9a).

(6) On June 12, 1948, during petitioner's trial, Judge Boyer in sentencing another criminal condemned the practice of Philadelphia "thieves" coming into Bucks County, that his statement was carried in the press and his "statement and actions *would be definitely reflected* in the jury box and would be prejudicial to their relations in having a fair and impartial trial" (R. 9a-10a).

(b) *Analysis of Petitioner's Allegations.*

(1) *Introduction:* The hearing before the District Court lasted 8 days. Petitioner called 22 wit-

nesses and offered 137 exhibits. The Commonwealth called 11 witnesses and offered 6 exhibits. In addition, the District Court had before it the record of prior proceedings in the State and Federal Courts (R. 100a, 107a). The hearing was conducted jointly by Chief Judge Albert L. Watson and Judge John W. Murphy. The facts relative to petitioner's allegations as found by the District Court and as supported by the State and Federal records are as follows:

> (2) *Allegation.* Petitioner was *forced* to go to trial the week following the trial of his co-conspirators (R. 9a).

The robbery and murder for which petitioner was tried occurred on December 22, 1947 (R. 1201a).

Preliminary hearing before a justice of the peace took place on January 5, 1948. At this hearing, petitioner was represented by counsel *of his own choosing*. Following the coroner's inquest (January 27, 1948) and the filing of the transcript from the justice of the peace (January 29, 1948) (R. 1205a), an indictment was secured on February 19, 1948. On the same day, the *district attorney* moved for a continuance of the trial of the case until the May Term giving as his reasons the critical condition of one of the Commonwealth's witnesses, who had been shot during the robbery, and the fact that one of Darcy's co-conspirators was not represented by counsel (R. 1206a).

On March 1, 1948, the petitioner, through counsel, moved for a severance[3] (R. 1206a).

[3] See the Act of March 31, 1860, P. L. 427, Section 40, 19 Purdon's Pennsylvania Statutes Annotated, Section 785 (Petitioner's Brief, p. 4); (R. 1206a).

On March 3, 1948, the Trial Court appointed counsel for Darey's co-conspirator Foster. In the District Court, the former District Attorney Edward Beister testified that at a conference early in March, defense counsel for Darey was informed that Darey's trial would commence immediately following the conclusion of the trial of his co-conspirator (R. 885a). The District Court found as a fact that such conference took place; and the defense counsel were so informed (R. 1207a). The trial of two of the co-conspirators was concluded on June 4, 1948. Petitioner's trial commenced on June 7. At no time did defense counsel for Darey *move for a continuance or a change of venue* (R. 1232a).

(3) *Allegation:* A newspaper article quoting Judge Boyer's alleged commendation of the Foster-Zeitz jury on its verdict added to the "hysteria and prejudice * * * [so] * * * as to influence beyond a slight degree * * * the *panel* * * * " from which the [Darey jury was] selected (R. 8a).

There is no evidence that the jurors selected to try the Darey case read the article or subscribed to the "Daily Intelligencer" in which it was printed. During the period in question, this newspaper had an average circulation of 5,329 (R. 1216a), in a county of 107,715 population (Relator's Exhibit 124).

The reporter who wrote the story does not know whether it was accurate (R. 222a).

The alleged comment of Judge Boyer as contained in the newspaper article is:

"'I don't see how you could, *under the evidence*, have reached any other verdict,' Judge Boyer said.

"'Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge these days.'

"'The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision,' * * *." (Emphasis supplied) (R. 1071a-1072a).

Of this matter the Supreme Court of Pennsylvania said:

"* * * [t]here is nothing whatever to indicate that any statements [of Judge Boyer] were prejudicial to [Darcy's] having a fair or impartial trial."

(367 Pa. 130, 134)

The District Court found:

"To place these remarks in their proper context: A few moments earlier in the same court room Judge Keller in discharging the remainder of the May 24 panel commended them for their satisfactory verdicts, the last one of which was an acquittal on a charge of rape. * * *

"In convictions for murder the sole, absolute and final responsibility for the verdict and its consequences rests with the jury. Here no question was raised as to identity or as to the defend-

ant's participation in the robbery. The confessions were not repudiated; the testimony was uncontradicted. * * * " (R. 1227a)

(4) *Allegation:* An atmosphere of hysteria and prejudice against Darey began to form immediately after the murder; that it gradually built up during the five months intervening between the murder and his trial and reached its climax after the Foster-Zeitz trial when "hysteria and prejudice swept the County" and "was so general as to influence beyond a slight degree" the jury panel from which the Darey jury was selected (R. 8a).

The District Court found as a fact:

> "At no time during the [Darey] trial was there any need to call for order. There were no outbursts, no disturbances, no untoward incidents, either in or outside the court room, in Doylestown, or elsewhere throughout the county. None from December 22, 1947 down to or after the trial. At no time during either trial was the court room filled to capacity * * * " (R. 1212a-1215a)

In addition to a considerable number of respondents' witnesses who testified in conformity with the above findings, 7 of the *petitioner's* witnesses, including his brother and aunt, gave testimony to the same effect.[4] No contradictory evidence was produced.

[4] Damgosh, R. 132a-133a; Thomas, R. 228a-236a, 236a-237a; Trauch, R. 247a-249a; Hoffman, R. 268a-269a; Davis, R. 449a-450a; Ford, R. 497a-499a; Joseph Darey, R. 555a. Cf., also Babinski, R. 178a-179a, and Farrier, R. 195a-196a.

(5) *Allegations.* The Darcy jurors were *familiar* with (a) what had transpired at the Foster-Zeitz trial, (b) petitioner's connection therewith, (c) Judge Boyer's utterances and (d) public and newspaper comments thereon (R. 9a).

In the District Court, petitioner presented no evidence as to this allegation.[7] The voir dire examinations of the jurors and alternates, taken under oath, as contained in the trial record (Relator's Exhibit 5a, 5b, 5c, 5d, 5e), reveal[8] that each juror was asked specifically whether he or she had read of the case. The juror Landis answered that he had heard of the case, but did not read about it, and that he knew nothing about the facts or evidence (Appx. 20, 23). Horne answered "not very much" (Appx. 14). Fretz said he had read about it "and that's about all" (Appx. 25). Mason stated that he had read only the headlines (Appx. 33). Mrs. Shive and the alternate Mrs. Brillman each stated that they had read "some" (Appx. 49, 63). Bliss answered that she had "read the headlines but not in detail" (Appx. 52). Price said that he had read of the case but doesn't believe everything he reads (Appx. 37). The juror Fluck and alternate Hickey each stated that they did not read

[7] Sometime after trial the jurors were interviewed, apparently by petitioner's brother and sister (R. 848a); both the Supreme Court of Pennsylvania (367 Pa. 130) and the Court of Appeals condemned this practice. Alleged evidence gained thereby relative to penalty was ordered stricken (203 F. 2d 403, 419).

[8] The trial record is before this court. For the convenience of the Court the examinations of the jurors and alternates have been printed as an appendix to this brief.

about it (Appx. 42, 63). The juror Rhoel stated that she did not read of the case (Appx. 56). Pardoe and Bricher each stated that they had read of the case, including the Foster-Zeitz trial (Appx. 2, 7). Wyckoff stated that he had read of the verdict in the Foster-Zeitz trial in the Philadelphia papers (Appx. 11). All the jurors testified that they did not have a fixed opinion as to the guilt or innocence of the defendant and that they could render a verdict solely upon the evidence.

The defendant exercised only 10 of the 20 preemptory challenges allotted to him by the law (R. 1210a):

> (6). *Allegation:* During trial, Judge Boyer appeared in the Courtroom, *in view of the jurors*, and "at times" assisted and conferred with Judge Keller, and his presence reminded the Darey jurors of the Foster-Zeitz trial and the Judge's comments on the verdict thereof (R. 9a).

Pursuant to Section 2245 of the United States Code, 28 U.S.C. 2245, the Trial Judge, Honorable Hiram H. Keller, filed a certificate in which he stated (under oath):

> "20. During the Darey trial, the Honorable Calvin S. Boyer, the additional law judge, occasionally joined the undersigned and sat with him at the beginning of the several sessions of court devoted to the trial of the case, for the purpose of transacting miscellaneous business, after which he withdrew when the case was in progress. On several occasions, however, Judge Boyer re-

mained for brief periods while evidence was presented. On one of these occasions, the undersigned conferred with Judge Boyer upon a difficult question of law as to the admissibility of certain evidence introduced by the district attorney, to which defendant's counsel, Mr. Achey, objected, in view of a recent amending Act of Assembly. A side bar conference before the Judge's bench was called, at which time the question was discussed between the undersigned and the defendant's counsel, Mr. Achey, during which Judge Boyer made certain comments. Mr. Achey objected to Judge Boyer taking part therein, whereupon Judge Boyer expressed his opinion that the judges had the right to confer without being obliged to get consent of defense counsel (N. T. p. 831) and withdrew from the bench, and thereafter did not rejoin the undersigned on the bench during the remainder of the trial.

"21. The foregoing conference held at side bar was in low tones of voice and completely inaudible to any person on the jury or the alternates who were trying the Darcy case, and any statements that may have been made at this side bar conference were unheard, unknown and never called to the attention of the jury.

"22. *At no other time, during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the undersigned in the trial of this case.*" (Emphasis supplied) (R. 1138a-1139a)

As to the prevailing practice in the Courts of Bucks County relative to the opening of Court, the District Court found:

> "* * * each morning and afternoon at the opening of court both judges take the bench to entertain motions and other miscellaneous matters in the Criminal, Common Pleas—law and equity—and Orphans' Court. Once this work is completed, one of the judges, if engaged in a trial in that court room, remains on the bench; the other judge leaving to perform duties in another court room or in chambers. * * *" (R. 1235a)

There is no evidence that any of the Darcy jurors were influenced by Judge Boyer in any way.

The side bar conference in which Judge Boyer participated was reported in the trial record. On direct appeal at which time, in addition to trial counsel, Darcy was represented by Thomas D. McBride, Esquire, present Chancellor of the Philadelphia Bar, the matter was not assigned as error (*Commonwealth v. Darcy*, 362 Pa. 259).

> (7) *Allegation:* During Darcy's trial, Judge Boyer in sentencing another criminal (Robert White) condemned the practice of Philadelphia "thieves" coming into Bucks County, that such statement was carried in the press and his "*statement and actions* would be definitely reflected in the jury box and would be prejudicial to their relations in having a fair and impartial trial". (R. 9a-10a)

The theory of this contention as contained in the *petition* for writ of habeas corpus is that the alleged condemnation of "thieves" on June 12, 1948, suggested to the Darcy jury the verdict and penalty to be given petitioner. On the first appeal to the Court of Appeals, it is clear that the majority of the court so understood the contention (See opinion of Judge Biggs, 203 F. 2d 407, at p. 414, continuing footnote, N. 7, 8).

The District Court found that:

> "Once accepted the jurors were kept together, during the trial, under the watchful care and supervision of court officials (in Foster-Zeitz 3, in Darcy 4 uniformed tipstaves). The jurors were not permitted to see any newspapers, hear any radio, or see any television program. They were kept free from any outside influence or contact." (R. 1212a)

> "* * * the sentence [of White] was passed and the remarks made in a court room other than that in which the Darcy trial was progressing. The jurors in the Darcy trial knew nothing whatsoever as to the sentence and the remarks. What occurred could not possibly have, and did not in fact have, any effect whatsoever on the outcome of the Darcy trial. It did not reflect in any manner hysteria or prejudice on Judge Boyer's part toward any of the four defendants charged with murder." (R. 1239a)

5.

SUMMARY OF ARGUMENT

Petitioner makes two sweeping allegations of denial of due process: (1) that his trial for murder took place in an atmosphere of hysteria and prejudice brought about by a newspaper campaign to secure the death penalty, and (2) that one of the judges of the county prejudiced the jury against petitioner. The State Supreme Court, the District Court and the Court of Appeals have all found that petitioner *failed to prove* the basic facts of his petition for writ of habeas corpus. Thus, respondents' argument is primarily factual.

(1)

This Court has held that if a court room proceeding is dominated by a mob, so that the jury is actually intimidated or if public passion is so great as to be irresistible by normal human beings serving as jurors, such a proceeding is a "sham" and due process is denied: *Frank v. Mangum*, 237 U. S. 309.

Darcy has attempted to bring himself within this rule; but the facts as found by the State and Federal Courts are that his trial was conducted with dignity and decorum and without any hostile congregation or demonstration at or near the court room, which during most of the trial was not even crowded. The trial was not attended by any threat of violence or any manifestation of hysteria. The jury was segregated

and without access to newspapers or other forms of communication.

The petitioner's attempted reliance on statements in newspaper articles as being true cannot prevail, because when offered for such purpose newspapers come within the exclusion of hearsay rule. The respondents have always objected to their use for such purpose. The only possible relevancy of such newspapers is to show that they created an atmosphere climaxed by some manifestation of prejudice. The record is clear that no such manifestation took place. The papers, of course, reported the crime, but during the five months intervening between the crime and petitioner's trial reporting was infrequent with a renewal of interest as the trial approached.

Significantly, the petitioner was represented by experienced counsel of his own choosing *who did not move for either a change of venue or a continuance.* The petitioner admits that no such motions were ever made but argues that the trial court should have changed the venue *sua sponte*. There is no authority in Pennsylvania for such action. Indeed, for a trial court to undertake such action would deny the defendant the constitutional right to trial by a jury from the "vicinage".

Witnesses called to show the alleged prejudiced feeling of the community were by the District Court found not to be credible or that their testimony failed to establish prejudice. The direct interest of several witnesses by reason of relationship to the petitioner is obvious. The testimony of all these witnesses was not oriented as to time, place or person and, at most,

shows only that there was indignation by reason of the murder. It would be a strange community if there was no indignation because of a murder. The petitioner offered no defense at trial and the evidence that he participated in a robbery-murder, together with his confession, firmly establish his guilt.

The respondents contend that the penalty was caused by the facts of the crime and that alone.

The jurors who actually tried the petitioner were subjected to an exhaustive voir dire examination by defense counsel. They testified that they could and would return a verdict on the evidence. The petitioner did not exhaust the peremptory challenges allowed him by law. There is no evidence of persons having intimidated the jurors or talked about the case with them either before they were sworn as jurors or during the trial.

(2)

The charge is also made that Judge Calvin S. Boyer prejudiced the jury trying petitioner. Judge Boyer had presided at the trial of Darcy's co-conspirators who were convicted and sentenced to death. The judgment and sentence in those cases have long since been affirmed. According to a newspaper story, Judge Boyer had commended the jury for its verdict *under the evidence*. There is no competent proof that the statement was made, but assuming it was, it does not indicate any personal prejudice on Judge Boyer's part. Of more importance, petitioner did not show that any of the Darcy jurors read the article nor that they were in any way prejudiced thereby.

Nevertheless, he assumes they did read it, and coupled with Judge Boyer's presence in the court room at times during petitioner's trial, he concludes the jury must have been robbed of its power and ability to make its decision on the evidence.

Prior to the daily beginning of petitioner's trial, both President Judge Keller and Judge Boyer sat on the bench for the disposal of routine business. How Judge Boyer's mere presence at such times affected the jury is left by petitioner to speculation. On one occasion Judge Boyer remained on the bench after petitioner's trial commenced and, at side bar, participated in a ruling on a question of law which ruling was not prejudicial to petitioner. Neither the ruling nor the participation were questioned on direct appeal. The evidence is clear that at no other time did he participate in the trial. There is nothing improper in having a two judge bench—even for an entire trial. In some counties in Pennsylvania two judges are *required* in a murder case. Judge Boyer did on occasion sit in the court room as a spectator in street clothes—at least fifty feet away from the jury. But there is no showing by petitioner that he said or did anything during such occasions prejudicial to Darcy. He was by no stretch of the imagination an overseer judge as argued by petitioner.

There is also an allegation that Judge Boyer, while a spectator, passed a note to the district attorney during the charge of the court. The District Court found that such occurrence did not take place, and that Judge Boyer was not even present in the court room at the time. The Court of Appeals refused to disturb this

finding. Assuming arguendo that it did occur, there is no showing that the jury observed it and no showing that what transpired thereafter was in any way prejudicial to petitioner. Significantly, although the Darcy family allegedly observed this event they never communicated it to anyone until approximately *three years after trial.*

In the final analysis the petitioner ignores the findings of fact and by assuming the existence of a state of hysteria and prejudice, and by assuming that Judge Boyer was prejudiced against him—neither of which assumptions were proved—he concludes that he was denied due process.

His present counsel admit that petitioner participated in a robbery during which a person was murdered (Brief, p. 7). Under the law of Pennsylvania he was guilty of murder of the first degree. The evidence produced at his trial caused the jury to fix the supreme penalty.

6.

ARGUMENT

I

THE STATE AND FEDERAL RECORDS AND THE FINDINGS OF FACT MADE BY THE DISTRICT COURT DEMONSTRATE THAT PETITIONER FAILED TO ESTABLISH THE EXISTENCE OF AN ATMOSPHERE OF HYSTERIA OR PREJUDICE

A.

The First Opinion of the District Court Properly Disposed of Petitioner's Allegations.

Throughout this proceeding it has been respondents' position that the first opinion of the District Court (97 F. Supp. 930) properly disposed of petitioner's allegations on the basis of incontrovertible facts contained in the State record.

Although the instant case was disposed of prior to the opinion of this Court in *Brown v. Allen*, 344 U. S. 443, the District Court followed the procedure there outlined by Mr. Justice Frankfurter:

> "Fourth. When the record of the State court proceedings is before the court, it may appear that the issue turns on *basic facts* and that the facts (in the sense of a recital of external events

and the credibility of their narrators) have been tried and adjudicated against the applicant. *Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application.* * * *" (Emphasis supplied) (p. 506)

In dismissing the petition the first time, Judge Murphy stated:

"Following the precepts of Johnson v. Zerbst, supra, 304 U.S. at page 465, 58 S. Ct. 1019; United States ex rel. Kennedy v. Burke, 3 Cir., 173 F. 2d 544, we examined the facts looking through form and into the heart and substance of the petition, the record in the trial and appellate courts, including the transcript of the testimony of the trial proceeding. We accept as true all of the well pleaded allegations of the petition, however much they may tax credulity, except to the extent that they conflict with the record and the trial transcript itself. * * *

* * * * * * *

"* * * it appears that petitioner is not entitled to a writ and that his petition is without merit (28 U.S.C.A. §2243; Walker v. Johnston, 312 U.S. 275, 284, 61 S. Ct. 574, 85 L. Ed. 830; Ex parte Quirin, 317 U.S. 1, 24, 63 S. Ct. 1, 87 L. Ed. 3) we have no alternative but to dismiss." (97 F. Supp. 930, 941-942)

On appeal the Court of Appeals remanded the case for hearing. "After full hearing and consideration of

al of the evidence" (R. 1246 sic, 224 F. 2d 504, 506), the District Court stated:

> "* * * we have fully and completely complied with the mandate of the Court of Appeals. With what result? Only to be more confirmed in our conclusions expressed in our opinion on May 17, 1951, that the defendant was afforded in form and in substance a fair and impartial trial in the Court of Oyer and Terminer in Bucks County, Pennsylvania, in June, 1948; that the allegations of the petition for habeas corpus are without support in the record and in the evidence; that the defendant was afforded due process of law under the Constitution of Pennsylvania and the Constitution of the United States." (R. 1240a)

B.

The Incontrovertible Facts Appearing in the State Record Completely Refute the Allegations of Hysteria and Prejudice.

The refusal of a Trial Court to grant a motion for change of venue has been decided by this Court (under similar factual circumstances) to raise no due process question: *Buchalter v. New York*, 319 U. S. 427, 430. In the instant case at no time either before or during petitioner's trial did counsel of his own choosing[7] move for either a change of venue or a

[7] "* * * Attorney Achey, at one time an Assistant United States Attorney for the Eastern District of Pennsylvania and engaged in the practice of the law for some thirty years, was one of the ablest and foremost active trial lawyers of Bucks County. His ability as such was recognized throughout the

continuance.[8] In determining whether hysteria and prejudice against petitioner did exist, this Court has recognized the significance of failing to make such motions.

In *Stroble v. California*, 343 U. S. 181, Mr. Justice Clark said (at p. 194):

> "* * * But, *in an effort to determine whether there was public hysteria or widespread community prejudice* against petitioner at the time of his trial, *we think it significant* that two deputy public defenders who were vigorous in petitioner's defense throughout the trial, *saw no occasion to seek a transfer* of the action to another county on the ground that prejudicial newspaper accounts had made it impossible for petitioner to obtain a fair trial in the Superior Court of Los Angeles County." (Emphasis supplied)

Also, in *United States v. Rosenberg*, 200 F. 2d 666, the Court of Appeals for the 2nd Circuit observed (at p. 669):

> "* * * Their present position is obviously an after-thought, inspired by the hope of securing a

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eastern section of Pennsylvania (see Resp. Ex. No. 5). In his charge the trial judge described him as 'able and learned'; the Supreme Court of Pennsylvania (367 Pa. at 133) as 'a highly reputable attorney of his own (Darcy's) choosing, eminently qualified from the standpoint of ability, experience and industry.' Attorney Power 'while a young man with less experience was a very good trial lawyer' (Resp. Ex. No. 5)." Opinion of District Court (R. 1228a).

[8] As to the refusal to grant a continuance see *Avery v. Alabama*, 308 U.S. 444.

new trial after having exhausted all hope of reversing the verdict by appeal and petitions for certiorari. The excuse offered by counsel for the Rosenbergs is that he did not realize at the date of the trial the extent and the inflammatory character of the publicity as it could not have been revealed to him 'by the usual sporadic reading of an average newspaper reader,' and he was so busy that he 'read the newspapers' infrequently. *But if he did not realize it, there is no reason to suppose that the jury was more seriously affected.* * * *." (Emphasis supplied).

See also, *United States ex rel. Bongiorno v. Ragen*, 7 Cir., 146 F. 2d 349, 352.

C.

The Federal Court Proceedings Confirm the State Court Record as to Hysteria and Prejudice.

1. *On the question of a change of venue and continuance.*

Petitioner argues that he was denied due process because the State court did not *sua sponte* change the venue or continue his trial. Significantly, no authority for this proposition is cited. Article I, Section 9 of the Constitution of Pennsylvania secures to a defendant the right to a speedy public trial by an impartial jury "of the vicinage". Where defense counsel has made no request for a judge to change the venue of his own volition would violate this constitutional right. The District Court in the first opinion was aware of this proposition:

"There is a limit however to which a trial judge or prosecuting attorney may go in protecting a defendant's interests. See Powell v. Alabama, supra, 287 U. S. at page 61, 53 S. Ct. 55; cf. Hickman v. Taylor, 329 U.S. 495, at pages 510-511, 67 S. Ct. 385, 91 L. Ed. 451. Defense counsel has the right to work with some degree of privacy, free from intrusion from the trial judge or prosecuting attorney. *If the trial judge or prosecuting attorney here attempted sua sponte to interfere in any manner with defendant's choice of counsel, his strategy or conduct of the defense, it would have been reversible error.* Cf. United States v. Bergamo, 3 Cir., 154 F. 2d 31." (Emphasis supplied) 97 F. Supp. 930, 940)

The prevailing view is that a court on its own motion may not order a change of venue: 32 C. J. S., Venue, Section 155; *State ex rel. Keogh v. Gilmore* (Ohio), 39 N. E. 2d 860.

Further Article III, Section 23 of the Pennsylvania Constitution provides:

"The power to change the venue in civil and criminal cases shall be vested in the courts *to be exercised in such manner as shall be provided by law.*" (Emphasis supplied)

This provision is carried into effect by the Act of March 18, 1875, P. L. 30, 19 Purdon's Penna. Statutes Annotated, Section 551 et seq. Section 1 of this act provides, in part:

"In criminal prosecutions the venue may be changed, *on application of the defendant or de-*

fendants, in the following cases: . . . . " (Emphasis supplied)

Under most limited circumstances, which have no application here, the Commonwealth may also move for a change of venue: *Commonwealth v. Reilly*, 324 Pa. 558, 571, 188 Atl. 574.

Petitioner's brief attempts to convey the impression (p. 64) that Darcy personally had not waived the right to ask for a change of venue, and that he was not permitted to explain that he had not done so. There is no evidence to support such contention. Darcy did not testify at trial (R. 1223a) nor at the hearing in the District Court (R. 634a-635a). Indeed, his counsel objected when the District Judge asked him whether he approved of the efforts of his present counsel (R. 635a, 741a).

2. *On the Question of the "Atmosphere" at the Trial of Petitioner.*

It is petitioner's contention that an atmosphere of hysteria and prejudice against him began to form immediately after the murder; that it gradually built up during the 5 months intervening between the murder and his trial and reached its climax after the Foster-Zeitz trial when this so-called hysteria and prejudice "swept the County of Bucks" and "was so general as to influence beyond a slight degree" the panel from which the Darcy jury was selected (R. 8a). This is an attempt to bring himself within the rule that a trial conducted under circumstances rendering the proceedings a mere "sham" cannot be constitutionally sustained: *Frank v. Mangum*, 237 U. S. 309;

Moore v. Dempsey, 261 U. S. 86; *Powell v. Alabama*, 287 U. S. 45, and *Shepherd v. Florida*, 341 U. S. 50. However, Darcy has utterly failed to establish any of the circumstances in those cases, or any other circumstances from which it can be concluded that his trial was not conducted in conformity with the constitutional concepts of due process.

In the cases above referred to there were *manifestations* of public sentiment hostile to the defendant *at his trial*. In the present case, no manifestation was disclosed by the evidence and the District Court so found:

> "* * * * [A]t no time during the [Darcy] trial was there any need to call for order. There were no outbursts, no disturbances, no untoward incidents, either in or outside the court room, in Doylestown, or elsewhere throughout the county.

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[9] *Frank v. Mangum*—Manifestations of public sentiment hostile to defendant sufficient to influence jury, to wit: disorder in and about court room; admonitions by court to keep order; threat to clear court room; spectators applauded colloquy between counsel; mob scene; cheering in streets while jury being polled.

Moore v. Dempsey—Trial conducted under pressure of a mob; large crowds, irresistible wave of public passion; trial lasted three-quarters of an hour—jury out five minutes.

Powell v. Alabama—Military guard on prisoner and around court house [to prevent mob rule] trial took place in atmosphere of tense hostile and excited public sentiment.

Shepherd v. Florida—Press release by sheriff, read or heard of by jurors, mob gathered at jail—burned home of defendant's father, other Negroes moved to prevent lynching; cartoon depicting four electric chairs, newspapers *demanded* death penalty.

None from December 22, 1947 down to or after the trial. At no time during either trial was the court room filled to capacity * * *" (R. 1212a-1215a)

Further the opinion of the Court of Appeals states:

"* * * on the evidence adduced in the district court it is clear, as that court found, that relator's trial was conducted with dignity and decorum and without any hostile congregation or demonstration at or near the place of trial. Indeed, during much of the trial the courtroom was not crowded. Certainly, the trial was not attended by any threat of violence or manifestation of mass hysteria. Moreover, a clear and elaborate showing was made to the district court that throughout relator's trial the jury was kept under strict guard, apart from other persons and without access to newspapers, radio, television or any other source of news or opinion." (R. 1246a-1247a)

3. On the Question of Newspaper Articles and Editorials and their Alleged Creation of Hysteria and Prejudice.

Throughout this proceeding, petitioner has placed extreme reliance upon newspaper stories as creating an "atmosphere" of hysteria and prejudice against him. A perusal of his brief discloses that they are not only being used in an attempt to attack the Darcy jury, but also as proof that the events depicted in the articles are true. The Commonwealth objected to the introduction of these articles as evidence of either contention (R. 217a-219a).

The law is clear that when submitted for the purpose of establishing facts, newspapers come within the exclusion of the hearsay rule: *State v. Lost*, 192 Wash. 651, 74 P. 2d 458; *United States v. Jaffe*, (D. C.), 98 F. Supp. 191; *Butler v. Stockdale*, 19 Pa. Superior Ct. 98; 32 C. J. S., Evidence, Section 726; *Poretto v. United States*, 5 Cir. 196 F. 2d 392, 395; *Alexander v. United States*, 9 Cir. 181 F. 2d 480, 484.

As to their use in an attack on the Darcy jury, it is submitted that without evidence *tending to show that they were read by jurors*, the articles should have been excluded as being immaterial: *Stewart v. United States*, 8 Cir., 300 Fed. 769, 778-779. See also *Stroble v. California*, 343 U. S. 181, 194.

The only possible theory upon which they can be considered relevant is to show that they influenced and excited the community to some *manifestation* of prejudice which was evident at Darcy's trial to the jury. (See the opinion of Chief Judge Biggs on the first appeal, with reference to *Shepherd v. Florida*, supra, 203 F. 2d 407, 415.) However, the overwhelming weight of the evidence is to the effect that Darcy's trial was a calm, dignified judicial proceeding unmarred by outbursts, violence mob rule, threats, noise, unruly crowds or any other circumstances which could be characterized as making the trial a sham. In short, there were no incidents or circumstances upon which to base a finding that there was created an atmosphere of hysteria and prejudice "prevailing at his trial" (Mandate, 203 F. 2d 407, 409).

As to the possible relationship between the newspapers and the jury, there is *no evidence* that the

Darcy jurors read more or less about the case than their answers on voir dire indicate. There is no evidence connecting these articles to the Darcy jurors in any way, shape or form, to show perjury, bias, prejudice or fraud. In fact, the record today on this score is the same as it was in June, 1948, when the voir dire examinations were made. Despite this lack of direct evidence, relator adds together a series of possibilities and innuendoes and exactly as in *Stroble v. California*, supra, "* * * *[H]e asks this Court simply to read those stories and then to declare, over the contrary findings of [State] courts, that they necessarily deprived him of due process* (343 U. S. 181 at 195)". In essence, this Court is asked to *speculate* on what the Darcy jury *did* read from what it *could* have read and then to conclude that the Darcy jury was prejudiced and he was denied due process. The judgments of society are not to be given such cavalier treatment. Petitioner's burden, which he did not meet, is more:

> "* * * it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, *and that it be sustained not as a matter of speculation but as a demonstrable reality*": *Adams v. McCann*, 317 U. S. 269, 281; *Buchalter v. New York*, 319 U. S. 427. See also *Stroble v. California*, supra. (Emphasis supplied)

As stated before, other than the disclosures of the voir dire examinations, "there is no proof that the jury or any member of it saw or heard the stories mentioned". In determining that a jury was not preju-

diced by newspaper stories, the first test is, did they read the articles: *United States v. Griffin*, 3 Cir., 176 F. 2d 727 at 731. The same reason is given in *Stroble v. California*, supra, 343 U. S. 181, 194-195. See also, *Stewart v. United States*, supra, and *United States v. Katz*, 3 Cir., 173 F. 2d 116, 117.

Although it is highly improbable, assume for the sake of argument that the Darcy jurors *read* all the articles to which petitioner refers.[10] First it is well settled that the mere reading of newspaper accounts does not in and of itself disqualify: *Reynolds v. United States*, 98 U. S. 145, 155-156; *Holt v. United States*, 218 U. S. 245; *United States v. Moran*, 2 Cir., 194 F. 2d 623; *Finnegan v. United States*, 8 Cir., 204 F. 2d 105.

In the Griffin case, supra, defense counsel directed the court's attention to newspaper stories *about the trial* (apparently the jury was not locked up), and just prior to recess the Court told the jury:

> "Now, again I want to emphasize that it is the evidence you hear, in this court room, not *what you might happen by chance to hear or read elsewhere;* e.g., the defendant Griffin is not standing trial for bribery. The charge is conspiracy to defraud the United States. This is the charge that must be proved. It is the practice of some Trial Judges to admonish the Jury each trial day. Well, I think this Jury consists of intelligent ladies and gentlemen, you have integrity and

[10] Such an assumpsition would convict the jurors of perjury and petitioner makes no such charge.

honesty and I am not going to admonish you any further in this trial unless the occasion should arise whereby it should become absolutely necessary for me to do so.'" (176 F. 2d. 727, 731). (Emphasis supplied).

Judge McLaughlin stated with reference to this statement by the trial court:

"* * * Complaint is made that the Court in its above admonition did not directly tell the jury not to read the newspapers or listen to the radio. In our judgment, the Court was entitled to consider as he did, that he was dealing with an intelligent American jury of honesty and integrity. *He told its members plainly that they were to decide the case only on the evidence they heard in the court room, not what they 'might happen to hear or read elsewhere'.* Immediately thereafter, inconspicuously and effectively, he dealt with the objectionable articles saying, '* * * e. g., the defendant Griffin is not standing trial for bribery. The charge is conspiracy to defraud the United States. This is the charge that must be proved'. Strong indication that what the Court said disposed of the incident in fair and practical fashion is shown by the fact that *the case is barren of evidence that any member of the jury was at all affected or influenced by newspaper or radio stories of the trial proceedings.* As Mr. Justice Holmes said in Holt v. United States, 218 U. S. 245, at page 251, 31 S. Ct. 2, at page 6, 54 L. Ed. 1021, 20 Ann. Cas. 1138: 'If the mere opportunity for prejudice or corruption is to raise a presumption

that they exist, it will be hard to maintain jury trial under the conditions of the present day.'" (176 F. 2d 727, 731) (Emphasis supplied).

In the instant case, the jury was segregated, and the evidence is that they did not see newspaper stories during the trial. As to articles appearing before trial, *defense counsel did not raise any objections to the court,* but substantially the same admonition given by the trial judge in the *Griffin* case was given by Judge Keller in his charge to the Darcy jury (R. 1225a).

Petitioner has shown nothing to indicate that the Darcy jury was not "an intelligent American jury of honesty and integrity."

Third, again assuming arguendo that the jurors read the articles, were they, in fact, prejudiced by the publicity? This question is asked and answered in the negative in *Stroble v. California,* supra and *United States v. Rosenberg,* supra. A comparison of those cases with Darcy reveals that the facts, indeed, the almost synonymous facts compel a negative answer here.

Facts	Darcy	Stroble	Rosenberg
(1) Defendant alleges communal prejudgment of guilt	Yes	Yes	Yes
(2) Newspaper publicity before arrest	No	Much	Some as to crime, but not specifically as to defendants
(3) Newspaper publicity at arrest	Yes	Yes—excerpts and text of confession	Yes

Facts	Darcy	Stroble	Rosenberg
(4) Newspaper publicity between arrest and trial as to defendants	Infrequent	Infrequent	Infrequent
(5) Newspaper publicity between arrest and trial as to crime in general	Yes	Yes	.....
(6) Period between arrest and trial	5½ Mos.	6 weeks	Julius 8 Mos. Ethel 7 Mos.
(7) Move for change of venue	No	No	No
(8) Move for continuance by defense	No	No	.....
(9) Extensive voir dire examination	Yes	Yes	Yes
(10) Defendant exhausts preemptory challenges	No	.....	No
(11) Period between trial and raising question of prejudicial publicity	2 Yr., 9 Mos.	Immediately on motion for new trial	1 Yrs. 6 Mos. U. S. v. Rosenberg (D.C. S.D. N.Y.) 108 F. Supp. 798, 800

It is true, of course, that no other related trials preceded the Stroble and Rosenberg cases. However, in the Rosenberg case, during the trial, the *prosecution* "timed" the release of an indictment against one Perl, for perjury committed in denying that he knew defendants. This was held not to be prejudicial (200 F. 2d 666, 669-670).

4. *Analysis of the Newspaper Articles and Editorials and Radio and Television.*

Editorials: The District Court fully and correctly disposed of the editorials to which petitioner referred (Ft. N. T. 46 & 47, R. 1218a-1223a). He now contends that there was an editorial or newspaper policy designed to secure the death penalty for these defendants.

Between the time of the murder and the beginning of Darcy's trial, he relies upon nine editorials as showing this policy. Of these, only two refer to Darcy, Foster and Zeitz, and then by content and not by name. Relator's Exhibit 40 (R. 994a) which appeared on *February* 16, 1948, states only that they are charged with murder and one eighteen year old (not Darcy) is accused of pulling the trigger in the murder case. Relator's Exhibit 42 (R. 998a) appearing almost *four months* before trial also refers to these defendants indirectly. However, it is difficult to see how it is evidence of an out of court campaign to secure the *death* penalty since it concludes that their arrest should discourage forays into the county "*especially if they are convicted and sent away for impressive periods.*"

Of the other seven editorials we find that one appeared nine days after the crime (Exhibit 22, R. 974a-975a) and refers to a Philadelphia case and suggests professional jurors. Another (Exhibit 49, R. 1005a) renews the suggestion. This appeared one month before the trial and is the closest to trial of this group of nine.

The remaining five in no way indicate a pattern or policy calculated to secure the death penalty for these defendants.[11]

News Stories. In the final analysis, Petitioner's main objection to the news stories is as to descriptive words; and of these they are descriptive of facts. Can he deny that he was one of a "quartet of bandits, all Philadelphians", who "shot three men" and that the four were "gunmen" who did "shoot it out" and became involved in a "four-way murder case" after being captured in a "wild chase?"

These facts came out at his trial (Cf., *Stroble v. California*, supra, 343 U. S. 181 at 195), and there has never been any showing by Petitioner that these words, or these articles, affected the deliberations of the jury, i.e., that these articles rather than the evidence produced at trial resulted in the death penalty.

The words "werewolf", "fiend", "sex-mad killer", "sex crimes", and "mad dog", appeared with reference to the defendant Stroble *within six weeks of his trial in metropolitan Los Angeles newspapers* but, as here, there was no showing of how it affected the jury.

As to the editorial appearing in the Philadelphia Evening Bulletin on June 7, 1948, and which was re-

[11] As to time, they are: January 16, 1948 (No. 25, R. 979a); February 2, 1948 (No. 31, R. 982a-983a); February 11, 1948 (No. 38, R. 992a-993a); April 2, 1948 (No. 46, R. 1001a); April 17, 1948 (No. 48, R. 1003a-1004a). Only an excerpt of Exhibit 25 is printed by Petitioner, out of context and the District Court much more fully discusses the exhibit in Footnote 47, R. 1222a.

printed in the Doylestown Daily Intelligencer on June 8, 1948 (R. 1086a), the eight jurors selected on June 7, 1948, could not have read the original or the reprint, since the evidence shows they were under the supervision of the court and were segregated. As to the remaining four, who were selected the following day, it is self-evident from their answers on voir dire that they knew nothing about the case, or if they did, they had no fixed opinion thereon and could and would render a verdict on the law and evidence as produced at trial. It is far too late now to attack the jurors on their answers given on voir dire. See cases cited by the District Court (R. 1230a) and *In Re Schneider*, 148 U. S. 162.

Finally, as to *all* articles appearing after the Darcy jury was selected, it is clear that they could have no effect *upon the jurors* since the uncontroverted evidence is that the jury was segregated at all times in the charge of four tipstaves, and that they did not read any newspaper during the trial.

Radio and Television: Petitioner states, contrary to the District Court's finding (R. 1216a), that there was wide radio and television coverage of the trial (Brief, p. 28) by reporters for the radio station covering the trial and reporting the news thereof at each noon and evening broadcast (Brief, p. 55). He again relies on newspaper articles (R. 1126a-1128a) *as being true*. The only witness called to show newspaper coverage, William Lynch, could only "presume" that the reports of the proceedings were broadcast and knows they didn't have a full time news writer to cover a trial (R. 287a-288a). This is but another ex-

ample of the danger in using hearsay newspaper articles as proof of essential facts. The opinion of the Court of Appeals states:

> "* * * relator has relied largely upon the daily newspaper accounts and editorial comments published in the community during the trial of two of relator's alleged confederates, which ended only three days before he himself was required to stand trial. We have examined all of this material. The evidence does not indicate, as relator would infer, that the jurors who tried relator were waiting in or near the courtroom during the period of the trial of his confederates. At most it indicates that during the two weeks immediately preceding relator's trial the community in general had experienced a revival and quickening of interest in the homicide attended by many expressions of indignation against its perpetrators. But it does not appear that feeling ran so high or that hostility toward the relator was so intense and so general as to make it seem incredible that the search for a satisfactory jury would yield twelve persons as open minded about this case as the jurors here claimed to have been. * * *" (R. 1247a-1248a)

Two of the dissenting judges also agree with the majority on this point (R. 1252a-1253a).

5. On the Question of Alleged Feeling in the Community.

Petitioner called 7 witnesses in an effort to establish "general hysteria and prejudice which swept the

county *as the result* of the Foster-Zeitz verdict" (R. 8a). He further states in his brief (p. 58) that this atmosphere reached its climax at the Darcy trial.

Petitioner's analysis of the testimony of these witnesses refers to remarks which are not oriented as to *time, place or person* and which remarks are rank hearsay. The District Court admitted the testimony over the objection of respondents only because of the mandate (R. 167a-168a).

Actually eight witnesses gave some testimony of this type. The direct interest of two is obvious: Patterson, Zeitz's aunt (R. 392a-418a), whom the District Court just did not believe (R. 1214a) and Heckman, Darcy's sister. Three of the witnesses had at least an indirect or prejudiced interest.[12] One, Davis (R. 431a), was unworthy of belief (See opinion, R. 1212a, Ft. Nt. 39, and especially R. 1215a) as the District Court specifically found in one instance. (See Ft. Nt. 57 to opinion, R. 1238a.)

Reverend Damrosh knew Harold Foster and would not be specific as to expressions of the public concerning Darcy (R. 125a). He could not be pinned down and refused to say what was the public's opinion (R. 126a-128a). He was not willing to say there was prejudice (R. 130a). He attended one session of the Zeitz-Foster trial and one of Darcy and could not specify his impressions before, during and after trial (R. 131a-132a). He stated there was "antagonism"

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[12] Farrier, attorney for Zeitz (R. 181a); Price, a friend of Darcy's sister (R. 314a); Hoffman, who wrote a letter to the Governor seeking clemency (R. 253a).

towards defendants (R. 130a) but, in response to questions by the court (R. 132a-133a) he admitted that there was no violence or going near the court house with guns or clubs, nor any disturbances that he even heard of. In short, this "antagonism" was displayed only vocally and perhaps a display of emotion.

Reverend Babinski lived in Feasterville, the scene of the crime (R. 160a) and although he heard remarks, he could not remember when, but it may have been in March, April, January or February and "possibly" very shortly after the offense occurred (R. 174a). He could not give the names of any men as having uttered any of the remarks which he heard (R. 177a). However, he did say that there were "no expressions of threats or violence in the sense that anybody was going to organize against the defendants." Further, in response to a question by Petitioner's counsel, he could not answer conscientiously whether there was any *change in feeling after the Foster-Zeitz trial and just before the Darcy trial* (R. 166a). (Remember, Petitioner alleges that at this period, hysteria and prejudice *swept* the County.)

The witness, Farrier, Zeitz's attorney on appeal, testified that when people knew he represented Zeitz, they engaged him in conversations which were "not polite" (R. 184a), but he later admitted to *Petitioner's counsel* that he talked with some prosecution witnesses who appeared at the trial (R. 201a-202a) and a number of persons who were in the tavern (R. 184a). One of these, Morris Phillips, told the witness very shortly after the crime occurred, "They ought to burn."

Phillips was a victim of the robbery which occurred when the murder was committed (R. 203a-204a), and when asked whether he raised on appeal any question of Phillips' testimony at the Zeitz trial [in view of his statements] he replied, "Heavens, no." In short, he did not consider the statement as evidence of "hysteria" but rather a human reaction of one who had been wronged in a horrible sequence of events.

Also, Mr. Farrier couldn't recall when the conversations were held, was not capable of giving an opinion as to public sentiment and stated that some of the remarks were made facetiously "because they liked to ride me." He further stated that "the very opinion and expression of opinion *was not* repeated over and over again" (R. 186a-188a). Finally, he stated he did not blame people for holding their opinions (R. 204a) and he investigated the case to prepare to save Zeitz "from the chair, if possible (R. 194a)." Mr. Farrier was an experienced lawyer, having handled about two hundred cases before this court and the appellate courts of Pennsylvania (R. 197,-198a). His testimony reveals that he was not worried about any alleged hysteria and prejudice. Nevertheless, he was worried about the penalty. Why? Because of the facts of the crime.[13]

The witness, Dr. Hoffman, as stated before, examined Darcy (R. 264a) and wrote a letter to the Board

[13] In a protracted proceeding, such as this, there is a tendency to forget to view the allegations, the evidence and the result in light of the established facts of the crime itself. We respectfully refer to the statement of the case, *supra*, page 6, and see also Ft. Nts. 15 and 16 to opinion of the court below (R. 1203a-1204a).

of Pardons in his behalf (R. 269a), and yet when asked (R. 268a-269a):

> "By Judge Murphy: The question is, Doctor, you a trained psychiatrist and neurologist, can you tell of one incident that you can recall in connection with any of these cases in Doylestown about the time of the trial? Do you understand the question?
>
> By The Witness: I understand the question. I am trying to find out if he means a demonstration.
>
> By Judge Murphy: Any incident that you can call to memory right now?
>
> By The Witness: No."

At most, this witness gave hearsay testimony about conversations, many of which he precipitated (R. 268a), and he did not particularize as to time or person (R. 265a-267a).

The testimony of the witnesses, Price and Davis, as well as that of the directly interested witness, Heckman, is subject to the same defect of vagueness.[14] As the District Court below said, "generally the witnesses could not recall any particular person or the time or place of any particular remark, or exactly what they heard in context (R. 1213a)."

Assuming arguendo, that the testimony of these witnesses is completely credible, the evidence they gave does not support the conclusion that the feeling

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[14] Price, R. 321a, 328a-329a, 332a-338a; Davis, C.T., R. 435a-437a; Heckman, R. 594a-601a.

of people, in general, amounted to a state of hysteria and prejudice, nor that the feeling grew in intensity reaching its climax at the Darcy trial. Their testimony fails to establish any pattern of behavior as to the time of the occurrence in relation to the trials (increase or decrease) and is devoid of pattern as to population or area involved.

In an effort to bolster his claim as to these witnesses, Petitioner's counsel makes the ridiculous assertion (Brief, p. 60) that the Commonwealth did not contradict this "evidence." The very statement points up the violation of the hearsay rule—for how is it possible to contradict alleged statements of unknown persons allegedly made at unknown times and places. Further, since no witness placed them in the vicinity of such statements, it is impossible to determine how (as his brief states, p. 60) respondents' witnesses could testify that they had *not* heard such alleged expressions.

6. *On the Presence of the Darcy Jury Panel During the Foster-Zeitz Trial.*

Although petitioner attempted to prove and presently contends that the jurors who served on the trial of David Darcy were present in court as a jury panel for portions of the trial of the co-defendants, Foster and Zeitz, the District Court rejected this contention and found as a fact that the jury panel from which the Darcy jury was ultimately selected did not appear in court until June 7, 1948 (R. 1208a), the date that the selection of the Darcy jury commenced. This finding was not questioned by the Court of Appeals in either the majority or dissenting opinions.

Certain parts of the records in the Courts of Oyer and Terminer of Bucks County indicated that the panel was originally summoned to appear on June 1, 1948 at which time the Foster-Zeitz trial was still in progress. However, partially at the suggestion of the District Court (R. 723a-724a), the original warrants and pay records of the jurors who served on the Darcy trial were introduced into evidence by the Commonwealth. These records conclusively show that the jurors were actually present in court as jurors only on the days during which the Darcy jury was being selected and during the Darcy trial (R. 796a, et. seq.) In addition, the certificate of Judge Keller completely clarified the fact that although originally summoned to appear June 1, 1948, the jurors did not in fact appear until June 7, 1948 (R. 1135a).

Of course, as an individual, a juror could have been present as a spectator during all or portions of the Foster-Zeitz trial, as that trial was open to the public as required by the Constitution of Pennsylvania. There is, however, no evidence, from which an inference could be drawn that any of the jury selected to try the Darcy case were present during any of the Foster-Zeitz trial. The exhaustive voir dire examinations refute such a contention. Only one prospective juror, William Slaughter, who was a resident of the county seat (R. 1143a) stated on voir dire examination that he attended as a spectator "several days off and on" during the Foster-Zeitz trial (R. 1143a). He was excused from serving on the jury by agreement of counsel. The colloquy concerning the excusing of Slaughter as a juror is indicative of the meticulous

fairness in which the trial was conducted throughout, by the trial court and the district attorney (R. 144a). Had defense counsel any reason to believe that the entire panel had been present during any portion of the Foster-Zeitz trial, he could have and would have challenged the entire array. Similarly, if any other prospective juror had been present during any portion of the Foster-Zeitz trial, this fact would have been brought to light during the thorough voir dire examinations. It might be noted that if, in fact, hysteria and prejudice was as great as petitioner now claims, it seems strange that only one of the entire panel of jurors examined on voir dire was sufficiently interested to attend the public trial of Foster and Zeitz and then to attend only "off and on". This in itself shows that the panel of jurors from which the Darcy jury was ultimately selected, as individual citizens were not sufficiently aroused by the alleged publicity to attend the trial.

II.

THE STATE AND FEDERAL RECORDS AND THE FINDINGS OF FACT MADE BY THE DISTRICT COURT DEMONSTRATE THAT PETITIONER FAILED TO ESTABLISH THAT JUDGE CALVIN BOYER IN ANY WAY PREJUDICED THE DARCY JURY OR INFLUENCED ITS DELIBERATIONS

A.

Analysis of the Allegations of the Petition as They Refer to Judge Boyer

Paragraph 11 of the petition (R. 7a-10a) attempts to link Judge Boyer with the general allegations of hysteria and prejudice and he is attacked in the following particulars:

1. That he "praised" the Foster-Zeitz jury for its verdict—which alleged statement was carried by the press (R. 8a).

2. That he appeared at different times in the court room where he *could* be seen by the Darcy Jury (R. 9a).

3. That he sat on the bench "at times" and assisted and conferred with Judge Keller (R. 9a).

4. That his presence reminded the Darcy jury of the Zeitz-Foster trial *and* of his expressed

"commendations" attitude toward the verdict (R. 9a).

5. That in sentencing another criminal he made a statement prejudicial to petitioner which was carried in the press *and* his statements and actions would be reflected in the jury box (R. 9a-10a).

In addition, it is contended that during the charge of the court, Judge Boyer wrote and passed a note to the district attorney, who stood up and addressed the court.

The same allegations were made to the Supreme Court of Pennsylvania and were rejected:

> "We do not deem it necessary to comment upon the criticism made of Judge Calvin S. Boyer beyond stating that *there is nothing whatever to indicate that any statements or actions on his part were prejudicial to relator's having a fair and impartial trial.*" (Emphasis supplied) (Commonwealth ex rel. Darcy v. Claudy, 367 Pa. 130, 134).

B.

Newspaper Story Commending Foster-Zeitz Jury

It is contended that a newspaper article quoting Judge Boyer's alleged commendation of the Foster-Zeitz jury on its verdict (Exhibit 78, 1071a-1072a) added to "the hysteria and prejudice • • • [so] • • •

as to influence beyond a slight degree * * * the panel * * * from which the [Darcy jury was] selected (R. 8a).

This article is subject to the same defects as the other newspaper stories previously considered (1) that it is hearsay, and (2) that there is no evidence from which even an inference can be drawn that the jurors read the article or even subscribed to the paper in which it was printed.

Keeping in mind that the evidence substantiates the finding of the District Court that petitioner wholly failed to establish any "general feeling of hysteria and prejudice"—or even a pattern relating thereto, this newspaper story is but an isolated occurrence which petitioner would forge into a nonexistent chain of events which he alleges reached its climax at the Darcy trial—a trial which the uncontroverted evidence shows was a calm judicial proceeding.

Again, petitioner assumes from this hearsay article that Judge Boyer did make such statement and that it expressed his *personal sentiments* against all the defendants and was "necessarily" circulated and broadcast throughout Bucks County. First, there is *no* evidence that the alleged statement was broadcast. Second, assuming the article is true, an objective reading thereof does not reveal any personal prejudice on the part of Judge Boyer. Third, the newspaperman who wrote the story does not know whether it was accurate (R. 222a). Fourth, it cannot be argued that such statement would have disqualified Judge Boyer from acting as the *trial* judge if he had been the only

judge in Bucks County. In discussing this article, the court below said:

> "To place these remarks in their proper context: A few moments earlier in the same court room Judge Keller in discharging the remainder of the May 24 panel commended them for their satisfactory verdicts, the last one of which was an acquittal on a charge of rape. An opinion expressed by Judge Boyer in his charge as to the proper penalty was reported on June 4, Rel. Ex. No. 76.
>
> "In convictions for murder the sole, absolute and final responsibility for the verdict and its consequences rests with the jury. Here no question was raised as to identity or as to the defendant's participation in the robbery. The confessions were not repudiated; the testimony was uncontradicted. * * * " (R. 1227a).

Indeed, under this theory, if correct, the Judges of the Supreme Court of Pennsylvania and the Court of Appeals could be disqualified:[15]

> " * * * In the opinion of the Supreme Court of Pennsylvania Zeitz 'showed extreme callousness and brutality in his actions and his remarks during the course of the holdup'; Com. v. Zeitz, 364 Pa. at 296; the three defendants were described as 'bandits'. Id. p. 296. And see opinion Chief Judge Biggs, 203 F. 2d at 419, 'The crime * * * admitted-

[15] It is true that the remarks of the appellate court were made after trial, but there is no evidence that Judge Boyer's alleged statement was heard or read by the Darcy jury.

> ly committed was a brutal one, meriting severest moral condemnation * * * *'; Com. v. Darcy, 362 Pa. at 278 'Under this evidence for a jury not to have found that these men were engaged in a common law robbery would have been perverse.'" (R. 1227a)

If Boyer would have been the trial judge, his *opinion* as to the Darcy case, given in his charge, would have been proper: *Commonwealth v. Simmons*, 361 Pa. 391, 405-410, 65 A. 2d 353.

C.

Presence in the Court Room

On the Bench. The practice in Bucks County at the time of the Darcy trial and for years prior thereto was for both Judge Keller and Judge Boyer to open court each morning for the transaction of miscellaneous business. During the Darcy trial, after the completion of this business, Judge Boyer left the bench shortly thereafter (R. 648a, 665-666a, 726a-727a, 734a, 875a). The clerk of courts tesfified that Boyer left every morning and did not return, "If he did it would have been his duty to record it (R. 370a-375a)." Further, the certificate of Trial Judge Keller states:

> "20. During the Darcy trial, the Honorable Calvin S. Boyer, the additional law judge, occasionally joined the undersigned and sat with him at the beginning of the several sessions of court devoted to the trial of the case, for the purpose

of transacting miscellaneous business, after which he withdrew when the case was in progress. On several occasions, however, Judge Boyer remained for brief periods while evidence was presented. On one of these occasions, the undersigned conferred with Judge Boyer upon a difficult question of law as to the admissibility of certain evidence introduced by the district attorney, to which defendant's counsel, Mr. Achey, objected, in view of a recent amending Act of Assembly. A side bar conference before the Judge's bench was called, at which time the question was discussed between the undersigned and the defendant's counsel, Mr. Achey, during which Judge Boyer made certain comments. Mr. Achey objected to Judge Boyer taking part therein, whereupon Judge Boyer expressed his opinion that the judges had the right to confer without being obliged to get consent of defense counsel (N.T., p. 831) and withdrew from the bench, and thereafter did not rejoin the undersigned on the bench during the remainder of the trial.

"21. The foregoing conference held at side bar was in low tones of voice and completely inaudible to any person on the jury or the alternates who were trying the Darcy case, and any statements that may have been made at this side bar conference were unheard, unknown and never called to the attention of the jury.

"22. At no time, during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the un-

dersigned in the trial of this case." (R. 1138a-1139a).

So far as we can ascertain, petitioner's argument here assumes (1) Judge Boyer was prejudiced and (2) the jurors had read of the alleged commendation.

Petitioner states that Judge Boyer was well "respected throughout the county (R. 10a)." He assumes Boyer's prejudice and concludes that because he was respected, this prejudice *could* have affected the jury. But, this is a two-edged sword, the fact that he was respected to a great extent, rebuts the unsubstantiated charge of personal prejudice.

The petitioner asserts (Brief, pp. 67-68) that Judge Boyer acted as an "overseer" and that a two judge bench is without precedent. The only instance of Judge Boyer's participation in the trial is discussed in the certificate of Judge Keller, ante. Nevertheless, even if the case had been tried by both Judges Boyer and Keller on the bench, acting jointly, such could not have raised any issue of the lack of due process. There is no constitutional limitation upon the number of judges who may sit in the trial of a criminal case.

In Pennsylvania, despite the petitioner's bold assertion that a "two judge bench" is unprecedented, such procedure is not only common but required in the few remaining judicial districts wherein there are judges both learned in the law and associate or lay judges. *See Myer & Murray v. Commonwealth*, 79 Pa. 308. Also, "the president judge * * * must be present, with an associate to constitute a court of oyer and terminer and general jail delivery": *Lay Judges in Pennsylvania*, Vol. 25, Pennsylvania Bar Association

Quarterly, pp. 132-135. Thus, "The fact that two or more judges sit and cooperate in the trial, or that the judge who has been assigned to try the case invites another judge to sit with him is not in error": 23 C.J.S., Criminal Law, Section 972.

In the court room as a spectator. At this time, the judges of Bucks County did not wear robes even on the bench (R. 736a).

The District Court, after discussing his presence on the bench, found that on several occasions during the Darcy trial, Judge Boyer sat for brief intervals on a chair just inside the court room door from the judges' chambers—across the court room from the jury box—apparently listening to the proceedings (R. 1237a).

The opinion of the Court of Appeals states (R. 1250a):

> "* * * Certainly Judge Boyer was privileged to attend and observe proceedings of the court of which he was a judge. His presence in itself was not an impropriety. Even if the jurors identified him as an official who was hostile to the relator, we think it would be necessary to show that he had said or done something prejudicial to the defendant during his stay in the courtroom before the fact of his presence and manifest interest could raise a substantial due process question."

It is submitted that no denial of due process resulted from Judge Boyer's occasioned presence. It cannot be argued seriously that the judge's mere presence robbed the jury of its ability to determine petitioner's guilt or innocence on the evidence alone.

D.

The Alleged Note Passing

Petitioner contends that during the charge of the Trial Court Judge Boyer, while present in the courtroom but not on the bench, wrote and passed a note to the district attorney who thereafter, when afforded opportunity by the Trial Court, sought orally to clarify a portion of the Court's charge; thereby violating petitioner's constitutional rights to a fair and impartial trial.

The oral statement and colloquy by the district attorney and the Court in regard to the charge is set out in full in the record (R. 1149a). No contention has ever been made, either on direct appeal or in the present proceedings, that the statements then made by the district attorney and the Court's replies thereto in any way prejudiced petitioner's rights. Logically, therefore, even if a note had been written and passed by Judge Boyer to the district attorney, regardless of the contents thereof, the communication could not have prejudiced the rights of the petitioner.

Petitioner has never attempted to show by any evidence or inference the contents of the alleged note. There is no present contention that the contents thereof were ever directly communicated to either the Trial Judge or the jury. Even if all of petitioner's conflicting testimony be given the fullest credence in a light most favorable to him, petitioner's rights were not prejudiced. At the very most, the testimony would merely show that Judge Boyer's familiarity with the

facts (having presided at the trial of Zeitz and Foster) and the law of the case, and having heard Judge Keller charge the jury, attempted to have Judge Keller clarify for the jury a point of law. It is submitted, assuming Judge Boyer was present in the courtroom and heard the Trial Judge give incorrect or inaccurate instructions to the jury, that it would have been not only Judge Boyer's right but his obligation to call this matter to the attention of Judge Keller in order that the jury obtain proper instructions, whether the inaccurate instructions were favorable or unfavorable to petitioner's position. In view of the discussion that took place after a note was allegedly passed, it is clear that its contents could not have been of assistance to the district attorney in the prosecution of the case, but at most only of assistance to the Trial Court in giving accurate instructions to the jury. The instructions have been held by the Supreme Court of Pennsylvania to be accurate statements of the law (362 Pa. 259, 66 A. 2d 663).

Factually, however, petitioner has wholly failed to prove the allegations he now makes that Judge Boyer ever passed any note to the district attorney. The District Court concluded as follows:

> "* * * that Judge Boyer did not at any time during the Darcy trial assist, attempt to assist, make any suggestion or in any other manner aid the Commonwealth in the prosecution of the case against David Darcy; that Judge Boyer did not pass any note or message of any kind to the District Attorney in connection with the trial for

the use of the District Attorney or Judge Keller." (R. 1237a).

This finding of fact was accepted by the Court of Appeals (R. 1250a).

Petitioner sought to prove the alleged occurrence by the testimony of a brother and an aunt of petitioner, and also a personal friend of the aunt, all of whom claim to have seen the incident, although with considerable variance as to the details of the occurrence. Whether the note was passed became purely a question of fact and should not be disturbed by this Court.

In a habeas corpus proceeding, the judge is the trier of facts and he may reject any or all evidence. In 32 C.J.S., Evidence, Section 1038, it is said (pp. 1093-1096):

> "* * * A fact is not undisputed merely because one or more witnesses testify to it and no one denies it, since it is for the trial court to determine what credence it will give to witnesses. Further, evidence is not regarded as undisputed if it is at variance with the facts and circumstances in the case, or with reasonable inferences therefrom or from the evidence; and reasonable inferences from circumstances or physical facts may outweigh undisputed oral testimony. * * * it has even been declared a general rule that the trier of facts may disregard or discount uncontradicted evidence. The common view is that evidence not directly contradicted is not necessarily binding on the triers of fact, and may, in proper circumstances, be disbelieved and given no weight, in

whole or part, *especially where the witness is a party or otherwise interested, some authorities holding that, in determining the legal significance of evidence, the testimony of interested parties is not to be regarded as undisputed.*" (Emphasis supplied)

See also, *The Conqueror*, 166 U. S. 110, 131; *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 408.

It is apparent that the Trial Judge upon careful analysis of the testimony and observance of the witnesses on the stand did not believe their testimony. The Court of Appeals refused to disturb that finding of fact (R. 1250a). Further, the District Court found that Judge Boyer was not even in the court room during the charge to the court (R. 1237a).

There is a strong possibility that the testimony of these witnesses is of recent invention. Significantly, *neither member of the Darcy family, who testified about the alleged incident, brought it to the attention of trial defense counsel, Mr. Achey, nor appellate counsel, Mr. Thomas D. McBride, although they assert that the members of the family have been discussing it for six years* (R. Ford, 529a, Joseph Darcy, 555a-556a).

Joseph Darcy, who during the hearing in the District Court served a subpoena on one of the jurors (R. 852a), and who previously had been instrumental in securing the forbidden statements of jurors (See R. 848a), testified that during the charge he was seated in the third row behind the railing at the end of the

section toward the center aisle of the court room (R. 540a, 546a).[16] On Relator's Exhibit No. 119 this would be on the extreme right side of the picture (R. 1121a). He stated that the section was pretty crowded and *there were people in front of him* (R. 547a) *and he* was fifty feet away from Judge Boyer (R. 550a). However, his testimony is contradictory as to where Judge Boyer was supposed to have been seated. At one point, he said Judge Boyer was "*in area*" of seat marked "Judge Boyer" on Exhibit No. 135 (R. 1131a), but he doesn't know which chair (R. 543a). Generally, he first placed Judge Boyer in front of the rail (R. 546a) on a chair immediately against the railing (R. 554a). Later, he stated that Judge Boyer was seated three or four feet behind the District Attorney's table (R. 554a-555a), which table he had previously placed correctly in front of the jury (R. 547a). Conceding, arguendo, that he was mixed up and meant the table closest to him, the inherent improbability of his story is clear[17]. He stated that Judge Boyer wrote a note on the table three or four feet (R. 551a) in front of him (R. 544a), but that he did not get up from his chair (R. 551a). Next, "Q. How did he get over to the tables? A. He leaned forward. Q. Three or four feet?

---

[16] In considering this phase of respondents' brief, we respectfully suggest that it will be helpful to make constant reference to the picture of the court room Relator's Exhibit No. 119 (R. 1121a) and the diagram of the court room, Relator's Exhibit No. 135 (R. 1131a).

[17] Commonwealth's witnesses testified to the effect that Relator's Exhibit No. 119 accurately depicts the location of the tables at the time of the Darcy trial (R. 651a). Relator's witness, Gordon, likewise so testified, except perhaps the table shown would be back further—*toward the bench* (R. 630a).

A. Yes." (R. 551a). It is submitted that the table was further away than three or four feet (Rel. Exhibit No. 119, and R. 876a), but, in any case, it would be practically impossible to have written anything on that table in the manner described by this witness. He further testified that after writing the note, Judge Boyer *did not* hold it up, but "just passed" it to District Attorney Beister, who was seated aside of Judge Boyer (R. 553a) throughout the charge (R. 548a). Then Beister allegedly got up and went across to the center of the court room and waited to be recognized by the court (R. 544a).

Neither this witness, nor the witnesses, Ford and Gordon, who testified about this alleged incident, stated that the note was passed by Beister to Judge Keller.

Gordon and Ford were allegedly seated aside of each other at this time in the second row where the letter "G" is marked on Relator's Exhibit No. 135 (R. 485a, 486a, 613a, 617a). Contrary to Joseph Darey's testimony, Ford stated that Judge Boyer was seated on the end seat marked with his name on Relator's Exhibit No. 135 (Cf., Rel. Ex. 119, R. 483a). Gordon couldn't say which chair he occupied (R. 613a). Although seated behind Ford on an angle with Judge Boyer, Joseph Darey does not recall seeing Ford (R. 564a).

Oddly enough, both of these witnesses were approximately ten feet (R. 514a, 631a) closer to Judge Boyer than Joseph Darey, but both testified they did *not* see Judge Boyer write the note (R. 522a-523a, 631a) notwithstanding the fact that Gordon stated she *was*

watching Judge Boyer at the time (R. 615a, 631a). Gordon said Judge Boyer "raised" his arm to pass the note (R. 615a); Joseph Darey said the note was not held up, but "just passed" (R. 553a). Gordon said there was nothing between Judge Boyer and the jury at this time (R. 615a-616a); Ford testified there were four or five people at the Commonwealth's table (R. 519a-520a) at the time and Joseph saw three or four at the table nearest to Judge Boyer (R. 548a).

Ford stated that Beister "jumped up[18] and stood at the bar in front of Judge Keller for five or ten minutes, waiting for recognition. During this interval Judge Keller continued to charge the jury and then Beister spoke. A reading in the District Court of this portion of the charge took forty-eight seconds (R. 524a-525a).

Darey's counsel admitted the interest of the witness, Ford (R. 476a-477a) and Gordon was a close friend of Ford (R. 619a). Petitioner's own evidence as to the alleged incident is highly contradictory. It is exaggerated and could well be the product of rehearsal by the witnesses themselves (See R. 501a, Cf., R. 509a).

Although the burden of proof to establish the fact was upon the petitioner, nevertheless the Commonwealth produced direct testimony that no such note was even passed. Significantly, Judge Boyer died before the present proceedings were instituted.

Edward G. Beister, the District Attorney who tried the case, and who is now Judge of the Courts of Bucks

[18] The District Court had ample opportunity to observe the demeanor of Judge Beister.

County, Pennsylvania (R. 870a), testified that his "best recollection" was that "at no time during the course of the trial did Judge Boyer assist, attempt to assist, make suggestions to or otherwise aid the Commonwealth in the trial of the case nor pass any messages to [the District Attorney] in connection with the trial of the case for the use of [the District Attorney]" (R. 911a-912a). This testimony was brought out upon cross examination and is positive testimony. In addition, Judge Keller, the Trial Judge, produced evidence by way of certificate (Respondent's Exhibit No. 5, R. 1113a et seq.), that:

> "22. At *no other* time, during the course of the trial, did Judge Boyer assist, volunteer to assist, or make any suggestions to or otherwise aid the [Trial Judge] in the trial of this case." (R. 1139a) (Emphasis supplied)

The "other time" reference is to a ruling on evidence made during the course of the trial and is in no way related to the alleged note passing incident. In addition, tipstaves and other court officials and persons present in the courtroom during the trial were called by the Commonwealth. Clarence Dannehower, one of the tipstaves, who was present throughout the trial and seated on an elevated chair behind and above the jurors and having a clear view of the court room (R. 649a-650a) testified that he saw no note passed (R. 650a), and that his duty was to observe for any unusual incidents (R. 661a). Other tipstaves testified that they saw no note passed.

In addition to the correct finding of fact by the District Court that no note was ever passed, there is ab-

solutely no evidence that any of the jurors observed the incident. Petitioner contends that the jurors must have seen the incident simply because it is alleged to have occurred in the courtroom. This inference, completely unwarranted by any evidence, is further stretched to the limit of imagination by contending that the jury, having observed the alleged incident, must have thereby unfairly prejudiced themselves against the petitioner.

E.

The Sentencing of White on June 12

The petition alleges that Judge Boyer made a statement in the sentencing of one, White, during the trial of Darcy and that such statement "would be definitely reflected in the jury box and would be prejudicial to their relations in having a fair and impartial trial" (R. 9a-10a).

Since the evidence completely refutes such an allegation in that the Darcy jurors did not have any knowledge of it [19], he (petitioner) now shifts his position and states that it is evidence of Judge Boyer's personal feeling and indignation against Darcy and his compañions. There is no shred of evidence to sustain a contention that Judge Boyer was prejudiced against

[19] Since they were segregated they did not read it. See page 20, ante. The petitioner's own witness, Trauch, who wrote the article, testified that the statement could not be heard by the Darcy jury since they were downstairs in the court room where Darcy's case was going on (R. 248a).

the petitioner. The newspaper reports aside from being purely hearsay, completely fail to show any prejudice by Judge Boyer against petitioner. The trial of the Foster-Zeitz case by Judge Boyer has long been affirmed. Petitioner further contends that the jury must have known of Judge Boyer's "prejudice" against David Darcy. Again there is absolutely no evidence that the jury in any way knew or were concerned with the personal feelings of Judge Boyer, whatever they may have been. Petitioner finally contends that because the jurors knew of Judge Boyer's supposed prejudice against petitioner that they, as individual jurors, were thereby swayed to render the death penalty. There is absolutely no evidence to indicate in any way that the jury was influenced by Judge Boyer's presence in the courtroom. There is absolutely nothing in the record to show that Judge Boyer did anything improper to prejudice the petitioner in the trial of this case. It is submitted that his actions throughout the trial of the case were perfectly proper and could not by any stretch of the imagination have influenced the jury in any way in reaching its verdict.

7.

CONCLUSION

In *Rosenberg v. United States*, 346 U. S. 273, Mr. Justice Clark said, at p. 296: "Our liberty is maintained only so long as justice is secure. To permit our judicial processes to be used to obstruct justice destroys our freedom. Over *two* years ago [the defendants] were found guilty by a jury. Unlike other litigants they have had the attention of this Court *seven* times; each time their pleas have been denied. Though the penalty is great and our responsibility heavy, our duty is clear". In the instant case, petitioner was found guilty over *seven* years ago by a jury. He has had the attention of this Court *five* times. The record reveals that he has failed to prove any facts from which it can be concluded that he was denied due process of law. "Indignation, because of the cruelty of the deed, there doubtless was; it would be strange if such were not the case in a law abiding community; but there is nothing which convinces us of the existence of such passion or prejudice as would prevent the twelve 'sober, intelligent and judicious' jurors who were sworn to try the issue from rendering a true verdict on the evidence", *Commonwealth v. Buccieri*, 153 Pa. 535, 546, 26 Atl. 228.

The penalty fixed for the petitioner was caused by the facts of the crime as produced in evidence. As in *Stein v. New York*, 346 U. S. 156 at 197: "The peti-

tioners have had fair trial and fair review. The people of the State are also entitled to due process of law".

Wherefore, it is respectfully submitted that the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,
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Attorneys for Respondents.

State Capitol,
Harrisburg, Pa.
March 16, 1956.

IN THE

Supreme Court of the United States

October Term, 1955
No. 323

UNITED STATES OF AMERICA ex rel. DAVID DARCY,

Petitioner

v.

EARL D. HANDY, Warden of Bucks County Prison, DR. FRED S. BALDI, Warden of the Western State Penitentiary, and CARL H. FLECKENSTINE, United States Marshal for the Middle District of Pennsylvania,

Respondents

APPENDIX TO BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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APPENDIX

(47) VOIR DIRE EXAMINATION OF TRIAL JURORS

W. D. PARDOE, sworn.

BY MR. ACHEY:

Q. Mr. Pardoe, you are listed here as a manufacturer. What is your business?

A. I am in rubber manufacturing.

Q. Where?

A. In Trenton, New Jersey.

Q. What company?

A. Thermoid Company.

Q. How long have you been with that company, sir?

A. Thirty-eight years.

Q. You live in Yardley?

A. Yes.

Q. How long have you been a resident of Bucks County?

A. About eight-and-a-half years.

(48) BY THE COURT:

Q. What is your full name, Mr. Pardoe?

A. William Dolton Pardoe.

BY MR. ACHEY:

Q. Have you read anything in the newspapers relative to the trial of the two boys last week, Foster and

Zietz, for the holdup down at the Feasterville Tavern and the death of William Kelly?

A. I read, yes, I read that, sir.

Q. Did you form any opinion as to the guilt or innocence of this defendant, David Darcy?

A. No, I did not.

Q. Did you discuss the matter with anyone?

A. No.

Q. Are you married, sir?

A. Yes.

Q. Do you have any children?

A. Have two.

Q. What are their ages?

A. One is thirty-four and the other is forty.

Q. Have you ever served as a juror in a murder case before?

A. No, I haven't.

Q. Have you served on juries before?

A. Grand jury in New Jersey.

(49) Q. Have you any conscientious scruples against capital punishment?

A. No.

Q. Do you believe or feel that if the evidence warrants it and from the charge of the Court as a member of this jury you could bring in a verdict of guilty and recommend the infliction of the death penalty?

A. May I have that question again.

Q. Do you believe that after hearing the evidence in this case and under the charge of this Court could you bring in a verdict of guilty of murder in the first degree and fix the punishment at death?

A. Yes.

Q. Could you also under the same circumstances bring in a verdict of guilty and fix the penalty at life imprisonment?

A. Yes.

MR. ACHEY: No challenge.

BY MR. CURTIN:

Q. Mr. Pardoe, what is the condition of your health?

A. Very good, sir.

Q. And what is your age?

A. Sixty-four.

Q. Mr. Pardoe, do you know Mr. Achey, one of the defense attorneys?

(50) A. No, I do not.

Q. Do you know Mr. Power?

A. No.

Q. Do you know Mr. Biester, the district attorney?

A. No, I do not.

Q. Do you know me?

A. No, sir, I do not.

Q. I understood you to say that you have formed no opinion in this case?

A. That is correct.

Q. Do you know William Darcy, the defendant in this case?

A. No.

Q. Do you know William Kelly, the person who died in this matter?

A. No.

Q. Do you know the families of either of these two persons?

A. No, I do not.

Q. I understand, Mr. Pardoe, from your answer that if the facts should warrant it as heard from the witnesses and if the law, as given by the Judge should warrant it that you would have no conscientious scruples against the imposition of the death penalty?

A. That is correct, sir.

BY THE COURT: (51) Mr. Pardoe, you were returned here in this panel under the name W. D. Pardoe. It is unusual to have a name on a jury panel by its initials. You say your name is William Dolton Pardoe. Are there any other people in Yardley by the name of W. D. Pardoe?

A. No, sir.

MR. CURTIN: We will accept the juror.

THE COURT: Take your seat in the box as juror No. 1.

* * * * * * * * * *

(60) ANNA W. BUCHER, sworn.

BY MR. CURTIN:

Q. Are you married or single?

A. Married.

(61) Q. Mrs. Bucher, where do you live?

A. Over near Pineville.

Q. What township?

A. Wrightstown Township.

Q. How long have you lived there?

A. About close on to fifteen years.

Q. How long have you been a resident of this county?

A. The same period.

Q. Where did you formerly live, Mrs. Bucher?

A. In Philadelphia.

Q. Mrs. Bucher, do you have any conscientious scruples against the imposition of the death penalty in murder cases?

A. I guess I don't. I always thought—I did think so at one time, but I guess if it was serious enough I wouldn't have.

Q. Do I understand, then, that if the evidence as you heard it from the witness and the law as given to you by the Court should warrant it that you would have no conscientious scruples against a verdict which would result in death?

A. That is right.

Q. You would not have such scruples?

A. That is right.

Q. What is the condition of your health, Mrs. Bucher?

A. I guess it is all right.

Q. Your health is good.

A. Yes, sir.

(62) Q. You are not currently under a doctor's care?

A. No.

Q. Do you have any children?

A. Yes.

Q. How many?

A. Six.

Q. What are their ages and sexes, please?

A. Five girls and a boy. The oldest is twenty-four years old, twenty-two, the boy is twenty, eighteen, sixteen and twelve.

Q. Do they all live at home?

A. Yes they do. They are away at school, some of them; and one is married, but she is living at home just now.

Q. What is your husband's occupation?

A. He is a physician.

Q. Medical doctor?

A. Yes.

Q. Where does he have his professional office?

A. In Olney in Philadelphia.

Q. Mrs. Bucher, do you know Mr. Achey, one of the defense attorneys?

A. No, I don't.

Q. Do you know Mr. Power, the man associated with him?

A. I don't know anything of them.

Q. Do you know Mr. Biester, the district attorney?

(63) A. No.

Q. Do you know me?

A. No. I think maybe I have seen you, but I don't know you.

Q. The case, Mrs. Bucher, about which you are now being examined as a prospective juror involves an occurrence in the lower end of the county on the evening of December 22, 1947, in which four men were involved, one of whom, David Darcy, is now about to be tried and in the course of which a man was allegedly murdered, a man by the name of William Kelly. Now, from that brief statement of the facts do you recall whether you ever read or heard of that case?

A. Well, I read something about it and heard something about it.

Q. Was what you read recently or was it when the offense occurred?

A. I didn't read much at the time. Of course, I guess, when it was brought up for trial I read a little bit more about it.

Q. You did read about it recently, then, as I understand?

A. Yes.

Q. Have you discussed the case?

A. Not particularly.

Q. From what you have read and from any discussion you may have had in the matter have you arrived at any opinion in your own mind as to the guilt or innocence of this particular defendant?

(64) A. Not totally, but partially.

Q. You have a partial opinion?

A. Yes.

Q. Is that opinion so fixed in your mind, Mrs. Bucher, that it would influence you in arriving at a verdict if you were seated as a juror?

A. I think not.

Q. Do you feel that you could set aside the opinion that you may have and be influenced and render a verdict solely on the evidence that you heard and the law as you heard it from the Court, or would that opinion influence you?

A. If the verdict were strong enough I guess I would be influenced.

Q. Perhaps I didn't make myself clear. The opinion that you say you have, is that opinion so strong in your own mind that it would influence your verdict regardless of the law and regardless of the evidence that you may hear in this case?

A. No, I don't think so.

BY THE COURT:

Q. Do you feel, notwithstanding the opinion you may have formed, if any, that you could nevertheless render a verdict strictly in accordance with the evidence and the law?

A. I think so, yes.

BY MR. CURTIN:

(65) Q. Did you know Mr. William Kelly, the person who was killed in this case?

A. No, I didn't.

Q. Do you know David Darey, the defendant in this case?

A. No.

Q. Did you or do you know either of their families?

A. No, I don't.

Q. Do I understand then, Mrs. Bucher, that you have no conscientious scruples against the death penalty?

A. No.

Q. And if the evidence and the law should warrant it you have no scruples which would prevent you from rendering a verdict which would result in death?

A. That is right.

MR. CURTIN: The commonwealth passes the juror.

BY MR. ACHEY:

Q. Mrs. Bucher, I understood you to say that you had sort of formed a partial opinion as a result of what you have read about the other two boys tried in this case?

A. That is right.

Q. Now, do you feel that you are able and willing to eliminate that partial opinion that you have formed and render a verdict based upon the evidence that you will hear from the witnesses in this particular case and the instructions of the Court?

(66) A. Yes, I believe so.

Q. In other words, do I understand that you are willing to go into this jury box and have an open mind on the subject?

A. Yes.

Q. In other words, you are not set to prejudge this case without hearing any evidence?

A. That is right.

Q. Have you ever sat on a jury before?

A. Never.

MR. BIESTER: If the Court please, we haven't objected to that question, but unless it is shown to be relevant in some way as to whether a prospective juror has previously sat on a jury I can't see what connection it has.

MR. ACHEY: Now, Mr. District Attorney, I am entitled to find out what experience she may have had with juries. There is no harm in asking that question.

MR. BIESTER: If the Court pleases, I object to it unless Mr. Achey explains why it is of any importance in this case whether a person has or has not sat on a jury.

MR. ACHEY: I don't have to explain.

THE COURT: We will overrule the objection. She has answered "no."

BY THE COURT:

Q. That is correct, isn't it, Mrs. Bucher?

(67) A. That is right.

BY MR. ACHEY:

Q. When you read about this case and read about names of people who were mentioned do you recall whether you knew any of those people?

A. No, I don't know any of them.

Q. Ever have any personal contact with them at all?

A. No.

Q. You recognize that the jury in a murder case, if they find the defendant guilty of murder in the first degree, that it is their sole duty to fix the punishment either at death or life imprisonment?

A. Yes, I know.

Q. And you feel that you have no scruples against capital punishment?

A. I have no scruples, no, but I would like to do it.

Q. But you are willing to render a verdict under the evidence and under the instructions of the Court?

A. That is right.

MR. ACHEY: Defense accepts this juror.

* * * * * * * * * *

MARVIN D. WEIDNER, sworn.

BY MR. ACHEY:

Q. Where do you live, Mr. Weidner?

(68) A. 21 Hamilton Street, Telford, Pa.

Q. What is your business?

A. Clerk, Norfolk and Western Railroad.

Q. Where?

A. Philadelphia.

Q. Philadelphia office?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Any children?

A. One, sir.

Q. How old?

A. Four-and-a-half.

Q. Are you an ex-service man?

A. No, sir.

Q. Have you read anything about the trial of this case?

A. Last week, sir; the verdict of last week's case.

Q. Did you read that in the local paper?

A. Philadelphia paper, sir.

Q. Did you recognize any of the parties whose names were mentioned in connection with that article?

A. No, sir.

Q. Have you discussed the case with anyone?

A. No, sir.

(69) Q. Do you have any conscientious scruples against capital punishment?

A. No, sir.

Q. Do you understand that in a murder case the law gives the jury the right first to determine whether or not the defendant is guilty of murder in the first degree, and then the jury has the sole right to determine the punishment, whether death or life imprisonment. Are you aware of that fact?

A. Yes, sir.

Q. If you were selected as a juror in this case

would you be willing to render a verdict in accordance with the evidence and instructions of the Court?

A. Yes, sir.

Q. Is there anything in your conscience or your conscientious scruples that would prevent you from rendering a verdict prescribing either death or life imprisonment?

A. No, sir.

Q. Were you ever employed as a private investigator or in any investigating capacity?

A. No, sir.

Q. Were you ever a railroad detective?

A. No, sir.

Q. In Telford?

(70) A. Tax collector at the present time.

Q. Did you ever hold any public office such as a justice of the peace?

A. Yes, sir.

Q. Are you acquainted with either Mr. Curtin or Mr. Biester?

A. No, sir.

Q. Of course, you and I don't know each other, do we?

A. I have seen you before, that is all, sir.

Q. And Mr. Power, my assistant?

A. No, sir.

Q. From what you have read about this case have you formed any opinion as to the guilt or innocence of this defendant?

A. No, sir.

MR. AGHEY: Passed.

BY MR. CURTIN:

Q. Mr. Weidner, did you tell us your age?

A. Thirty-four.

Q. And are you married or single?

A. Married.

Q. Any children?

A. One.

Q. Is that a boy or a girl?

A. Boy.

Q. His age?

A. Four-and a-half.

Q. What is your condition of health, Mr. Weidner?

(71) A. Very good, to the best of my knowledge.

Q. I believe you said that you read about the case, but you formed no opinion as to the guilt or innocence of this defendant?

A. No, sir.

Q. Do you know David Darcy, the defendant in this case?

A. No, sir.

Q. Did you know William Kelly?

A. No, sir.

Q. Do you know the families of either of these two men?

A. No, sir.

Q. Did I understand you to say that you had no conscientious scruples against the death penalty in murder cases?

A. That is right, sir.

Q. So that you would be able, if the facts should warrant it as the evidence was given in court and the law as given by the Judge as to those facts, to render a verdict involving the death penalty?

A. Yes, sir.

MR. CURTIN: Commonwealth accepts the juror.

(108) JESSE H. HORNE, sworn.

BY MR. ACHEY:

Q. Mr. Horne, you live outside of Quakertown?

A. That is right.

Q. Whereabouts?

A. About four miles east.

Q. Flatland?

A. Past Flatland, about a mile and a half.

Q. Hayeock Township?

A. That is right.

Q. How long have you lived there?

A. Sixteen years.

Q. Farming?

A. That is right.

BY THE COURT:

Q. How old are you, Mr. Horne?

(109) A. Forty-one.

BY MR. ACHEY:

Q. Do you have a wife and family?

A. Wife and two children.

Q. Have you ever been employed as a policeman or detective or investigator?

A. No, sir.

Q. Have you read anything about this case?

A. Not very much.

Q. Do you know any of the parties connected with this case?

A. None whatsover.

Q. Do you have any conscientious scruples against capital punishment?

A. No, sir.

Q. You are aware that the jury in a murder case has the duty first to find whether the defendant is guilty or not guilty, and if they find the defendant guilty of murder in the first degree then it is their sole duty and power to fix the penalty at either death or life imprisonment; do you know that?

A. Yes, sir.

Q. If you were selected as a juror in this case could you render a verdict and fix the penalty under the instructions of the Court?

A. Yes, sir.

(110) Q. Would you feel, sir, that under the evidence if you convicted the defendant of murder in the first degree that you would have to impose the death penalty, or realize that you could also have the alternative of imposing life imprisonment?

MR. BIESTER: Will the stenographer please read that question.

(Previous question repeated by the reporter.)

MR. BIESTER: We object to that, if the Court pleases. This man doesn't know what the evidence will be.

MR. ACHEY: The questions so far have all been put as to give the jury the idea that they must bring in a death penalty. I merely asked him whether or not conscientious scruples are such that if under the evidence there was a verdict of first degree murder, whether or not he would have anything against imposing life im-

prisonment as a penalty. I don't think we have to solely put it to a prospective juror that he must bring in the death penalty.

MR. BIESTER: I have no objection to the way Mr. Achey just stated it.

MR. ACHEY: I will state it so that it meets the approval of the Court.

THE COURT: I will sustain the objection.

MR. ACHEY: Exception?

THE COURT: Exception.

(Exception noted for defendant.)

(111) BY MR. ACHEY:

Q. Mr. Horne, if the verdict of the jury in this case were murder in the first degree do you feel that you would have to bring in a verdict fixing the punishment at death or could you fix the punishment at life imprisonment? I am not asking you whether you would do it, but whether you could feel free to give either one of those two punishments?

A. I could do either.

Q. In other words, you do not feel that it is mandatory upon you as a juror in the event of a verdict of first degree murder that you would have to bring in the death penalty?

A. As I understand the question I should say yes.

BY THE COURT:

Q. Could you render a verdict according to the evidence and the law as given to you by the Court?

A. Yes, sir.

BY MR. ACHEY:

Q. Were you ever a juror heretofore?

A. No.

Q. Do you have any physical disability or illness that would make it difficult or be a handicap for you to serve on this jury?

A. None that I know of.

Q. How many cows do you have at home?

A. Oh, about a dozen.

(112) Q. Have you got anybody to take care of them if you should be locked up on this jury?

A. It could be provided for.

Q. We don't want to work a handicap on you, that is the reason I asked that question. Now, did I ask you whether you had read anything about this case or heard anything about it?

A. I did.

Q. You have no opinion as to the guilt or innocence of this defendant?

A. None whatsoever.

Q. If in the trial of this case it was disclosed that the defendant David Darcy and several others were engaged in the commission of a robbery and, after the robbery had taken place and the defendant and his companions were leaving the place a murder was committed would you feel that under such evidence it would be mandatory upon you to bring in a verdict of murder in the first degree with the sentence fixed at death?

MR. BIESTER: Objected to, if the Court pleases.

THE COURT: The objection must be sustained. That depends entirely upon the evidence to be received and the law.

MR. ACHEY: Exception?

THE COURT: Exception.

MR. ACHEY: Defendant passes.

(113) THE COURT: He couldn't be asked to give an opinion at this time.

BY MR. CURTIN:

Q. Mr. Horne, did you say that you were married?

A. Yes, sir.

Q. How many children do you have, sir?

A. Two.

Q. Are they boys or girls?

A. Boy and girl.

Q. What are their ages?

A. Thirteen and nine, respectively.

Q. Is Mrs. Horne living?

A. That is right.

Q. Mr. Horne, do you know Mr. Achey, the defense attorney?

A. No, sir.

Q. Do you know Mr. Power, his associate?

A. No, sir.

Q. Do you know either Mr. Biester or myself?

A. I know Mr. Biester, slightly.

Q. Has he ever represented you as your attorney?

A. He has.

Q. He has?

A. Yes, sir.

Q. How long ago, Mr. Horne?

A. I would have to make a guess. I don't know (114) offhand. Probably six or seven years ago.

Q. Would your acquaintanceship with Mr. Biester in any way influence you in arriving at a verdict in this case?

A. None whatsoever.

Q. Do I understand, then, that in the event you were selected as a juror you could reach a verdict entirely uninfluenced by any previous acquaintanceship you might have had with Mr. Biester?

A. I could.

BY THE COURT:

Q. Was this a private business relationship or one which he performed by virtue of his office as district attorney or assistant district attorney?

A. That was a private affair.

BY MR. CURTIN:

Q. How long ago was this that Mr. Biester represented you, Mr. Horne, if you recall?

A. As I said before, I don't know definitely offhand. Six or seven years ago, possibly, maybe eight.

MR. BIESTER: If the Court please, we accept the juror with the reservation that Mr. Achey shall have the right to question him further and have him examined on the basis of prior representation, if he wishes to do so.

BY MR. ACHEY:

(115) Q. Mr. Horne, your matter with Mr. Biester was a private matter where you required advice, or where it involved real estate, or something like that?

A. My procuring his advice was entirely up to me, if that answers your question. In other words, I was not obligated to see Mr. Biester.

Q. It wasn't a case in court, was it?

A. No, sir.

Q. The fact that you went to Mr. Biester and engaged him to do work for you is not going to have anything to do with your exercising your judgment as a juror in this case; is that correct?

A. That is right.

Q. I mean you might have had me represent you, or Mr. Curtin?

A. That is right.

Q. And that wouldn't affect your judgment in passing upon the evidence in this case; is that correct?

A. That is correct.

MR. ACHEY: All right.

THE COURT: Accepted as juror number four.

(135) OLIVER C. LANDIS, sworn.

BY MR. ACHEY:

Q. Mr. Landis, what township do you live in?

A. Plumstead.

(136) Q. How long have you been living there?

A. Fifty-eight years.

Q. Do you know anything about this case?

A. Hardly anything. Just that I knew there was such a thing.

Q. You know nothing about the facts or the evidence in the case, then, do you?

A. No, sir.

Q. Do you have any conscientious scruples against capital punishment?

A. No, sir.

Q. If you were sworn as a juror in this case would

you be willing to render a verdict according to the evidence and the charge of the Court?

A. I can hardly hear you.

Q. If you were sworn as a juror in this case would you be willing to render a verdict under the evidence and the charge of the Court?

A. Yes, sir.

Q. You say it is difficult for you to hear me from where I am standing?

A. Not if you talk like you are now. I can hear you, but you were sort of mumbling. Now you are talking a little low.

Q. I just wanted to hear what your range was for hearing. Are you afflicted with any physical illness or (137) ailment that might hinder you or handicap you in serving as a juror in this case?

A. No, sir.

Q. Were you under a doctor's care recently?

A. No, sir.

Q. Do you have help at home to take care of your farm should you be drawn as a juror in this case and locked up for a week or ten days?

A. I would say no.

Q. Would it be a handicap to you to serve on this jury?

MR. BIESTER: If the Court pleases, it is not a question of whether it would be a handicap. It is a handicap to anybody.

THE COURT: No doubt about that.

THE WITNESS: Yes, I would say it is a handicap.

BY MR. ACHEY:

Q. You know that under the law a jury in a murder case has the duty to render a verdict of guilty or not guilty under the evidence and the charge of the Court?

A. Yes.

Q. And in the event of a verdict of guilty of Murder in the first degree it becomes a further duty and the sole duty of the jury to fix the penalty at either death or life imprisonment?

A. Yes.

(138) Q. You are aware of that. You feel that in the case of a verdict of guilty of murder in the first degree that you must render a—fix the punishment at death or would you—could you render it for life imprisonment? Do you feel that if the defendant were found guilty of murder in the first degree that the death sentence would be mandatory?

A. It is either one or the other.

Q. Yes.

A. It is mandatory for life imprisonment or death.

Q. Yes.

A. That is right. That is the way I understand it.

Q. Do you feel that if it were murder in the first degree you would have to bring in a verdict of the death penalty?

A. Not the way I understand it.

Q. Have you formed any opinion as to the guilt or innocence of this defendant?

A. No, sir.

MR. ACHEY: Passed.

BY MR. CURTIN:

Q. Mr. Landis, I don't remember whether you were asked whether you were married or not?

A. I am married.

Q. Do you have any children, sir?

A. Yes, sir.

Q. How many.

(139) A. Three.

Q. What are their ages?

A. Thirty, thirty-five, twenty-four.

Q. What are the sexes of the children?

A. Boys.

Q. All boys?

A. Yes.

Q. Mrs. Landis is living?

A. Yes, sir.

Q. And your occupation is farmer?

A. Yes.

Q. Do you have a stock farm?

A. Dairy; chickens and dairy.

Q. I believe you told Mr. Achey that you did not have any opinion in this case; is that correct?

A. That is correct.

Q. Although you had read about it?

A. No, I have *not read about it. I know that* I have heard; just know that there is such a case, that's all. I hadn't read about it.

Q. I believe you said your health was good?

A. Yes.

Q. Do you know Mr. Achey, the defendant's attorney?

A. I do.

Q. Has he ever represented you?

A. No.

(140) Q. You know of him, then, as an attorney, or do you know him socially?

A. As attorney.

Q. But you say he has never represented you?

A. No.

Q. Has he ever represented your family?

A. No.

Q. Do you know Mr. Power?

A. No, I do not.

Q. Do you know either Mr. Biester or myself?

A. Well, I knew you fellows from seeing your faces and seeing you here, that's all.

Q. Have either of us represented you?

A. No.

Q. Did you know William Kelly, the deceased?

A. No.

Q. Do you know David Darcy, the defendant?

A. No.

Q. Do you know either of their families?

A. No.

Q. I believe you said, sir, that if the facts as you heard them here in the courtroom from the witnesses and the law as given to you by the Judge should warrant it you would have no conscientious scruples which would prevent you from rendering a verdict resulting in death?

(141) A. That is correct.

Q. You have no scruples against the death penalty in murder cases?

A. No.

MR. CURTIN: Commonwealth accepts the juror.

(157) FRANKLIN T. FRE[redacted] sworn.

BY MR. ACHEY:

Q. Your business is that of a miller, I believe?

A. Salesman, sir.

Q. You don't actually work in the mill?

A. No, sir.

Q. Whom do you work for?

A. Flour Milling Compar[redacted] in Bangor.

Q. Does your territory cover all of Bucks County?

A. Yes, sir; eastern Pennsylvania.

Q. Are you acquainted with Feasterville, where this murder too place?

A. Feasterville?

Q. Yes. Did you ever hear of that?

A. I have heard of it. I don't know too much about it.

Q. Have you read anything about this case?

A. Well, I read, and that's about all.

Q. From what you have read have you formed any opinion as to the guilt or innocence of this defendant?

A. No. No, I haven't.

Q. Have you discussed the case with other people?

A. No. No, sir.

Q. Do you know any of the parties who were involved, either policemen or witnesses?

A. No, sir.

(158) Q. Do you have any conscientious scruples against capital punishment?

A. Well, if they are proved guilty.

Q. In other words, if a person is found guilty of first degree murder, it is the jury's duty to fix the degree of punishment at either death or life imprisonment. You are aware of that, are you not?

A. Yes, sir.

Q. And you realize that even though the defendant is found guilty of murder in the first degree it is not mandatory upon the jury to impose the death penalty, do you know that?

A. Yes, sir.

Q. They can also make a recommendation for life imprisonment; is that true?

A. That is right.

Q. You don't have any conscientious scruples, in the event the defendant is found guilty of murder in the first degree, in bringing in either verdict; is that right?

A. That is right.

Q. Do you know either of these gentlemen, Mr. Biester or Mr. Curtin?

A. I don't believe I do.

Q. Have you ever had any business transactions with either one of them?

A. No.

(159) Q. Have you ever had any business transactions with me?

A. Not that I know of.

Q. Or Mr. Power?

A. No.

Q. I don't suppose you knew Mr. Kelly, the man who was killed in this matter?

A. Did I know him?

Q. Yes.

A. No, sir.

Q. William Kelly?

A. No, sir.

MR. ACHEY: Passed, your Honor.

BY MR. CURTIN:

Q. Do I understand, sir, that you do not know Mr. Achey?

A. Is that Mr. Achey there?

Q. That was Mr. Achey who was just talking.

A. Well, I have heard of him, but I wouldn't know him.

Q. I understand, then, that he has never represented you as attorney?

A. No, sir.

Q. And you don't know him socially, then?

A. No.

Q. And you say you don't know Mr. Power or either Mr. Biester, the district attorney, or myself?

A. No, sir.

(160) Q. He is the gentleman who just walked away from me. What is your age, Mr. Fretz?

A. Thirty-seven.

Q. And are you married or single?

A. Married.

Q. Any children?

A. One.

Q. Boy or girl?

A. Girl.

Q. Her age, please?

A. She is fifteen. She is going to be sixteen. She is fifteen today.

Q. And she lives at home, I presume, with you an Mrs. Fretz?

A. That is right.

Q. Mr. Fretz, this case involves an occurrence i Feasterville on the 22nd day of December, 1947, i which four men were involved, one of whom, Davi Darcy, one of the defendants, is here today. Did yo ever hear of the case?

A. I heard of it.

Q. And read about it or discussed it?

A. Well, I have read about it. I just didn't tak any interest in it.

Q. I understand you to say you formed no opinio from what you read?

A. No.

(161) Q. From what you read or heard; is tha correct?

A. That is right.

Q. And I believe you said you did not know Wil liam Kelly?

A. No.

Q. Do you know the defendant, David Darcy?

A. No.

Q. Do you know either of their families?

A. No.

Q. What is your condition of health, Mr. Fretz?

A. Well, I don't know.

Q. Are you currently suffering from any physical disability?

A. No.

Q. You are not currently under a doctor's care?

A. No, indeed not.

Q. And did I understand you to say that you had no scruples against capital punishment?

BY THE COURT:

Q. Do you know what the word "scruples" means?

A. Will you explain it to me, sir?

Q. Do you have any objection to the imposition of the death penalty for murder in the first degree, if the evidence warrants it?

A. No.

BY MR. CURTIN:

Q. Do I understand then, sir, that in the event (162) that the facts as you hear them from the witnesses and the law as you heard it from the Court should warrant it you would have no conscientious scruples against a verdict resulting in death?

A. That is right.

Q. You would have no such scruples?

A. No, sir.

MR. CURTIN: Commonwealth accepts the juror.

. . . . . .

(165) ROGER MASON, sworn.

BY MR. CURTIN:

Q. Where do you live, Mr. Mason?

A. Near Dublin.

Q. In what township?

A. Bedminster.

Q. How long have you lived there?

A. Two years permanently. I have had the place ten years.

Q. Where have you lived previously to that?

A. New Jersey. Westfield.

Q. How long have you lived in Bucks County?

A. About two years.

Q. Are you married or single?

A. Married.

Q. What is your age?

A. Sixty-five.

Q. Mr. Mason, do you have any conscientious scruples against the imposition of the death penalty in murder cases?

A. No.

Q. You have not?

A. No.

Q. Do I understand then, sir, that you would have no conscientious scruples against rendering a verdict (166) which would result in the death of this defendant if the facts as you learned them from the witnesses here in the courtroom and the law as told to you by the Court should warrant it?

A. Under those circumstances I have no scruples.

Q. No conscientious scruples?

A. No.

Q. Do you have any children, Mr. Mason?

A. Yes, three.

Q. Boys or girls?

A. Boys.

Q. What are their ages?

A. Thirty-one, twenty-six, and twenty-four.

Q. The boys all live at home with you?

A. No. None.

Q. What is the condition of your health, Mr. Mason?

A. Good.

Q. I take it, then, you are not currently under the care of a physician?

A. No.

Q. And suffering from no physical disability at this time?

A. No.

Q. Mr. Mason, this case involves an occurrence at Feastervile, in the lower end of the county, on the 22nd day of December 1947, in which four men were involved, one of whom, David Darcy, is now on trial, and in (167) the course of which a man by the name of William Kelly was allegedly murdered. Did you ever hear of that case?

A. I believe I saw the headlines in the paper.

Q. You read something about it in the paper?

A. Yes.

Q. Have you discussed the case?

A. No.

Q. From what you read in the paper have you formed any opinion as to the guilt or innocence of this defendant, David Darcy?

A. No. I paid very little attention to it.

Q. You formed no opinion. Mr. Mason, do you know Mr. Achey, the defense attorney?

A. No.

Q. Do you know Mr. Power, his associate?

A. No.

Q. Do you know Mr. Biester, the district attorney?

A. I think I do.

Q. Has he represented you as attorney?

A. No. The other way around.

Q. Mr. Biester was in some case in which you were a party?

A. Well, it didn't get to a case; it was settled out of court.

Q. Would your acquaintanceship with Mr. Biester influence you in any way in your arriving at a verdict in this case?

A. No, I don't think so.

(168) Q. Could you, if chosen as a juror, arrive at a verdict or render a verdict solely from the evidence that you have heard from the witness stand and from the law as the Judge gave it to you?

A. I should do my best.

Q. Entirely uninfluenced by your acquaintanceship with Mr. Biester?

A. Yes.

Q. Do you know me?

A. No.

Q. Do you know the defendant, David Darcy?

A. No.

Q. Did you know the deceased, William Kelly?

A. No.

Q. Do you know either of their families?

A. No.

MR. CURTIN: Commonwealth passes.

BY MR. ACHEY:

Q. Mr. Mason, what did you do before this and while you lived in Westfield, New Jersey?

A. Why, my last work was with the Crucible Steel Company. I was a coordinating engineer for them.

Q. Where is Westfield, New Jersey?

A. About twenty miles west of New York.

Q. How long had you lived there?

(169) A. About twenty years.

Q. Did you ever serve on a murder jury before?

A. No.

Q. Westfield is where the Hails Mills case took place some years ago?

MR. BIESTER: If the Court pleases, I object. I don't think that makes any difference.

THE COURT: It is not material.

BY MR. ACHEY:

Q. You say you have only read the headlines about this case. Where did you read them? In what paper?

A. That was in the Doylestown paper.

Q. Well, there were a number of headlines, weren't there, on a number of successive days? Did you read the articles, too?

A. No, I didn't read the articles, only the headlines.

Q. You own your property where you live?

A. Yes.

Q. You say you came here about two years ago?

A. To live permanently. I have had my farm—I have had it for over ten years, or about ten years.

Q. Well, you have owned property in Bucks County for ten years, and you have taken up your permanent residence about two years ago?

A. That is right.

Q. Were you at any time in your life employed (170) as a guard or policeman or private investigator, or have you done any investigating work whatsoever?

A. Was I employed?

Q. Yes.

A. No, never.

Q. At no time?

A. Never.

Q. Did you ever hold public office?

A. No.

Q. Never been a justice of the peace?

A. No.

Q. Do you actually farm this farm or just live on it?

A. I am farming it.

Q. If you were drawn on this jury would you have someone to take care of your stock, or would you worry about that?

A. Well, I have some livestock, yes.

Q. Do you have anyone to take care of it?

A. No.

Q. You say that you have no conscientious scruples against the imposition of the death penalty following the conviction of murder in the first degree?

A. Under the circumstances as were outlined, no.

Q. You feel that you could render a verdict under the evidence and under the charge of the Court without any pangs of conscience whatsoever in your verdict of the death penalty?

(171) A. Yes, with the evidence and the Court's instructions I believe I could.

Q. You said in your answer: "under the circumstances as outlined." What did you mean by that?

A. The way that the question was put to me, with the evidence being satisfactory to my mind, and the court's instructions given to cover the situation.

Q. You would follow the instructions of the Court with respect to the law?

A. Right.

Q. You recognize that in this state the jury has the power, after a conviction of murder and a verdict of guilty of murder in the first degree, to impose the penalty of either death or of life imprisonment. You are aware of that, are you not?

A. I didn't know it.

Q. You did not know that. Well, in this state where a verdict is brought in of murder in the first degree, the sole province of the jury is to fix the punishment, namely, either the death penalty or life imprisonment. It is not the province of the Court to fix the penalty. You did not know that?

A. No, I didn't know that.

Q. Well, now that you know that does that make any difference to you as to whether or not you have any conscientious scruples to the imposition of the death penalty?

A. I don't see that that alters it any, no.

(172) Q. You feel that in the event of a verdict of guilty of murder in the first degree it is mandatory upon you to recommend the death penalty?

A. You just explained it was not.

Q. I am asking you whether you feel it is mandatory?

A. Well, after your explaining it is not, why, I would say no.

Q. In other words, Mr. Mason, you are now aware of the fact that the jury has the power, after a verdict of murder in the first degree, to fix the penalty at either life imprisonment or death? It is now clear in your mind, is it?

A. Yes, sir; if that is the law, why, I guess it is clear in my mind.

Q. In the event of a conviction of murder in the first degree is there anything in your conscientious scruples that would prevent you from bringing in a verdict of life imprisonment?

A. No.

Q. I believe you said that you were an engineer?

A. Right.

Q. Chemical or mechanical?

A. Well, electrical by education.

Q. You work for the Crucible Steel Corporation?

A. Crucible Steel Company for the last few years.

Q. I want to ask you one other question, Mr. Mason. Is your farm operations such that it would cause you to worry about your absence of being away from it a week, if you were on this jury?

(173) A. No question I would rather not be away from it.

Q. I understand that, but I want to know whether or not the worry it would cause you by being away from it might influence you or affect you in your judgment as a member of this panel?

A. I will try not to let it affect my judgment?

MR. ACHEY: Defendant accepts the juror.

(178) HOWARD PRICE, sworn.

BY MR. ACHEY:

Q. Where do you live, Mr. Price?

A. Two miles east of Mechanicsville.

Q. On what road?

A. Street Road.

Q. How long have you lived there?

A. Forty-nine years.

Q. You have a farm out there?

A. Have two of them.

Q. Do you know anything about this case?

(179) A. Oh, only what I read in the paper.

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. Well, you can't form much opinion when you read newspapers, I imagine. That is the only answer I can give you.

Q. I mean, from what you have read have you formed any opinion as to this man's guilt or innocence?

A. I would say no.

Q. In other words, you don't believe everything you read in the newspapers?

A. No, sir.

Q. Do you know Mr. Biester, the district attorney?

A. Oh, I just know him as—

Q. I mean outside?

A. No. I just know him. I seen him out different times. I don't think he knows me.

Q. You are not an acquaintance of his?

A. No.

Q. Nor of Mr. Curtin, the assistant district attorney?

A. No.

Q. You are not an acquaintance of mine?

A. Guess not, no.

Q. Nor Mr. Power, my associate?

A. No.

Q. Do you have any conscientious objections, (180) scruples, against capital punishments? In other words, if a man is convicted of murder in the first

degree do you have any objection to finding him guilty and imposing the death penalty?

A. I would say not.

Q. Are you aware of the fact that here in Pennsylvania under the law the jury has the right, duty rather, to pass upon the guilt or innocence of the defendant, and if they convict the defendant of first degree murder then it is the sole duty of the jury to fix the punishment at either death or life imprisonment. Are you aware of that?

A. Oh, yes.

Q. Is it your understanding that where, after a verdict of guilty of first degree murder is returned, that the jury must bring in a verdict of the death penalty?

MR. BIESTER: If the Court please, Mr. Achey has asked that several times. We object, because it would be inconsistent with the question and answer just given.

THE COURT: Yes.

MR. BIESTER: In which the man was told correctly that the jury could impose either penalty. The prospective juror said he understands that, and now he is asking it in an entirely different way.

THE COURT: I wonder if Mr. Achey would recognize the question if you read it back to him?

(Previous question repeated by the reporter.)

(181) MR. ACHEY: My thought is this, your Honor, that in a verdict of guilty of first degree

murder that he knows that there are two punishments, one is either the death penalty or life imprisonment. Now my question is directed to this point, whether or not he feels that he must bring in the death penalty or whether or not they can bring in life imprisonment. Now I think that is a perfectly fair question, because the juror may be under the impression that where there is a verdict of guilty of first degree murder it is mandatory to bring in a death sentence.

THE COURT: Doesn't that pre-suppose instructions on the subject first?

MR. ACHEY: Well, of course, that may be a little late if the juror—we are now inquiring of the prospective juror what his beliefs are to determine whether or not we shall challenge his qualifications either for cause or preemptorily. If he believes it is mandatory—

THE COURT: But you have already told him that that is not a fact; that he could either return a verdict resulting in the death penalty or life imprisonment, if they find the defendant guilty of murder in the first degree.

MR. ACHEY: Maybe I am putting the cart before the horse. Maybe I should have asked that question before I asked the other one. All right, I won't pursue it, in view of the objection.

(182) BY MR. ACHEY:

Q. Mr. Price, what is your condition of health?

A. Oh, I guess fair.

Q. You haven't been under the doctor's care lately, have you?

A. No.

Q. And you feel that you could serve on this jury although you might be kept together here for possibly a week or ten days? That would not seriously impair your health?

A. Oh, I don't know whether that would or not. That is a question.

Q. But at the present time you feel fine?

A. Yes, I feel all right.

MR. ACHEY: Defense passes.

BY MR. CURTIN:

Q. Do I understand, Mr. Price, that you are not currently under any physician's care?

A. No, I am not.

Q. And I believe you also said that you have no conscientious scrúples against the imposition of the death penalty in murder cases if the facts and the law warrant it?

A. That is right.

Q. Did you tell us whether or not you were married?

A. Oh, yes, married.

Q. Do you have any children?

(183) A. No children.

Q. How long have you been a farmer, Mr. Price?

A. All the days of my life.

Q. I believe you said you only knew Mr. Achey from seeing him on the street?

A. That is right.

Q. You have never been an acquaintance of his?

A. No.

Q. I think you said the same as to Mr. Power, Mr. Biester, and myself?

A. That is correct.

MR. CURTIN: Commonwealth accepts the juror.

. . . . . .

(189) (Tuesday, June 8, 1948, 9:30 o'clock a.m.)

MR. BIESTER: If the Court pleases, let the stenographer please note that the defendant, David Darcy, together with his counsel, are now in court and ready to proceed with the calling of the jury on voir dire.

THE COURT: You may proceed with the calling of the jury.

MR. BIESTER: If the Court please, I should like to make a motion at sidebar.

(The following took place at sidebar, not in the hearing of the jury.)

MR. BIESTER: Yesterday during the calling of the jury on the voir dire one of the prospective jurors made a statement which Mr. Achey felt was inimical to his case, and he asked that a mistrial be declared. We have now asked that the eight jurors who have been called in the box be excused so nothing of that kind can happen again; and since Mr. Achey has objected to that off the record I think that should be put on the record so that if anything arises in the calling of the jury it would not be the basis of a mistrial.

MR. ACHEY. I object, because I don't think there is any precedent for locking up a jury or keeping them out of the court room after they have been asked or accepted to sit in this trial. They have a (190) right to sit in court, and it is their duty to be in court.

THE COURT: They haven't been sworn.

MR. ACHEY: That doesn't make any difference. They have been selected.

(220) L. CALVIN FLUCK, sworn.

BY MR. ACHEY:

Q. Mr. Fluck, you live in Quakertown?

A. I do.

(221) Q. What is your business?

A. Full fashioned hosiery knitter.

Q. By whom are you employed?

A. Best Made Silk Hosiery.

Q. Are you married?

A. Yes.

Q. Do you have any children?

A. No.

Q. And have you read about this case?

A. I have not.

Q. Have you discussed it with anyone?

A. I have not.

Q. Do you know anything whatsoever about the facts in the case?

A. I do not.

Q. Do you have any conscientious scruples against capital punishment?

A. I have not.

Q. If you were sworn as a juror in this case would you render a verdict according to the evidence and the instructions of the court?

A. I would.

Q. Are you at present a justice of the peace or do you hold any public office?

A. I do not.

(222) Q. You have not been connected with any law enforcement agency?

A. I have not.

Q. Are you acquainted with Mr. Biester, the district attorney?

A. I am not.

Q. Or Mr. Curtin or myself?

A. I am not.

Q. Or Mr. Power?

A. I am not.

Q. Do you have any physical ailment which might handicap you or might inconvenience you in sitting as a juror in the trial of this case?

A. Not that I know of.

MR. ACHEY: No challenge.

BY MR. CURTIN:

Q. Mr. Flack, the occurrence involved here happened on the 22nd day of December 1947 in Feasterville in the lower part of Bucks County involving four men, of which David Darcy is one, and in the course of which one William Kelly was allegedly murdered. From that recitation of the facts, are you familiar with this case?

A. I am not.

Q. So therefore you have arrived at no opinion of this case?

A. I did not.

BY THE COURT:

Q. You said you did not read about this case?

(223) A. That is true, I have not.

Q. Or discussed it with anybody?

A. No, sir.

BY MR. CURTIN:

Q. Did you know William Kelly, the deceased?

A. I did not.

Q. Do you know David Darcy, this defendant?

A. I do not.

Q. Do you know the families of either of these two men?

A. I do not.

Q. Do you have any children, sir?

A. I have not.

Q. Are you married or single?

A. Married.

Q. Is Mrs. Fluck living?

A. She is.

Q. And I believe you said your condition of health was good?

A. So far as I know.

Q. And I believe you also said that you knew none of the attorneys, Mr. Biester, Mr. Power?

A. That is true.

Q. Mr. Achey or myself?

A. That is true.

THE COURT: Has he been asked about his scruples?

MR. CURTIN: Yes, sir.

(224) BY MR. CURTIN:

Q. I believe you said you had no conscientious scruples against the imposition of the death penalty?

A. No.

BY THE COURT:

Q. You are not opposed to the death penalty if the evidence and the law warrant it?

A. I am not.

BY MR. CURTIN:

Q. Then as I understand it, sir, if the facts as you heard them from the witnesses and the law as explained to you by the Court should warrant it you would have no scruples which would prevent you from rendering a verdict of death?

A. That is true.

Q. You have no such scruples?

A. No.

MR. CURTIN: The Commonwealth accepts the juror.

* * * * * * *

(228) ELVA A. SHIVE, sworn.

BY MR. CURTIN:

Q. Are you married or single?

A. I am married.

Q. Mrs. Shive, where do you live?

A. Dublin.

Q. How long have you lived there?

A. Eight years.

Q. Where did you live prior to living in Dublin?

A. New Britain Township.

Q. How long have you lived in Bucks County?

A. All my life.

Q. What is your age?

A. Sixty.

(229) Q. Do you have any children?

A. By my first husband.

Q. How many children?

A. One.

Q. Boy or girl?

A. Boy.

Q. And his age, please?

A. Thirty-six.

Q. Mrs. Shive, do you have any conscientious scruples against the rendering of a verdict of death in a murder case?

A. No.

Q. You have no such scruples. Do I understand, then, that if the facts as you heard them and the law as the Judge should expound it to you would warrant it you would have no scruples against rendering a verdict of death?

BY THE COURT:

Q. Do your know what is meant by the word "scruples"?

A. Whether I object:

BY MR. CURTIN:

Q. Do I understand, then, that if the facts as you should hear them from the witnesses should warrant it, and if the law, as explained by the Court, should warrant it, you would have no conscientious scruples against the death penalty?

A. What evidence I believe.

Q. You would have no scruples?

(230) BY THE COURT:

Q. You say you do believe in the death penalty if the evidence warrants it?

A. Yes, with good evidence.

BY MR. CURTIN:

Q. What is the condition of your health, Mrs. Shive?

A. All right, I guess, as far as I know.

Q. You are not currently under any doctor's care?

A. No.

Q. What is your husband's occupation?

A. Painter.

Q. Self employed?

A. Yes.

Q. Do you have any occupation other than housewife?

A. No.

Q. Do you know Mr. Achey, the defense attorney?

A. I think I do.

Q. Have you ever been a client of his?

A. No.

Q. Do you know him socially?

A. No. Just I know him.

Q. Do you know him from just seeing him about or because of personal contact?

A. Just from seeing him.

Q. Do you know Mr. Power, his associate, William (231) Power, the young man seated at the table with him?

A. No.

Q. Do you know Mr. Biester, the district attorney,

the gentleman seated to my right? I presume you do not. Do you know me, Mrs. Shive?

A. No.

Q. Would your acquaintanceship or knowing Mr. Achey influence you in any way in arriving at a verdict in this case? Do you understand my question?

A. Yes; whether he could influence me, you mean.

Q. Would the fact that you know Mr. Achey, as you say from seeing him about, would that influence you in any way in arriving at a verdict in this case, or would you be guided solely by the evidence that you heard here and the law as explained by the Court?

A. By the evidence that I hear.

Q. You would not be influenced at all by the fact that you know Mr. Achey?

A. I don't think so. If I am speaking right—

THE COURT: I don't believe the witness understands the questions.

THE WITNESS: I just know him.

BY MR. CURTIN:

Q. The fact that you know Mr. Achey would have no effect on you?

BY THE COURT:

(232) Q. Would that prevent you from rendering a verdict according to the evidence, the mere fact that you know Mr. Achey?

A. No, I don't think it would.

Q. It wouldn't interfere with it at all?

A. I don't think so.

BY MR. CURTIN:

Q. Mrs. Shive, this case involves an occurrence in Feasterville on the date of December 22, 1947,

wherein four men were involved, one of whom was David Darcy, the man now on trial, and in the court [sic] of which a man by the name of William Kelly was allegedly murdered. Now, from that brief recitation of the facts have you ever heard of the case?

A. No; I don't know too much about it.

Q. You have heard of it, however?

A. I know.

Q. Did you read about it?

A. Some.

Q. Have you discussed it?

A. No.

Q. As a result of what you read about it have you formed any opinion?

A. No.

Q. As to the guilt or innocence of this defendant?

A. I don't know.

Q. You have not?

(233) MR. CURTIN: Commonwealth passes the juror.

BY MR. ACHEY:

Q. How long did you say you lived in Dublin?

A. Eight years.

Q. Where did you live before that?

A. New Britain Township.

Q. You have stated that you have no objections to bringing in a verdict fixing the penalty in a murder case of death, have you not?

A. Yes.

Q. Would you have any objection or any conscientious scruples against bringing in a verdict and fixing the punishment at life imprisonment?

MR. BIESTER: If the Court please, we object to that question, it being a double barreled question. If he will ask the question on conscientious objection, of course I have no objection to that. If he said would she have any objection to bringing in such a verdict, she can't possibly answer that question. She doesn't know.

MR. ACHEY: I will withdraw the question in view of the objection.

BY MR. ACHEY:

Q. In the event of a conviction of murder in the first degree do you have any conscientious scruples against bringing in a verdict of life imprisonment?

(234) A. No, I don't.

MR. ACHEY: Defendant accepts the juror.

(Recess taken from 10:55 a.m. to 11:20 a.m.)

MR. BIESTER: May it be noted, if the Court pleases, that the defendant and his counsel are in court?

THE COURT: So noted.

* * * * * * *

(238) RUTH G. BLISS, sworn.

BY MR. CURTIN:

Q. Your name is Ruth G. Bliss?

A. My name is Ruth G. Bliss.

Q. Are you married or single?

A. Married.

Q. Mrs. Bliss, where do you live?

(239) A. 485 N. Main, Doylestown.

Q. How long have you lived in Doylestown?

A. About seventeen years.

Q. What is your age?

A. Sixty.

Q. Mrs. Bliss, have you any conscientious scruples against the death penalty in murder cases?

A. No, not particularly.

Q. In the event that the facts as you heard them from the witnesses and the law as given to you by the Court should warrant it would you have any scruples that would prevent you from rendering a verdict of death in this case?

A. No.

Q. Do you have any children, Mrs. Bliss?

A. None.

Q. You said "none"?

A. Not any.

Q. What is your husband's occupation?

A. He is retired right now.

Q. Do your have any occupation other than he wife?

A. Yes. I have an antique shop. My own business.

Q. How long have you had that business?

A. About sixteen years.

Q. Where is that located?

A. In my home.

(240) Q. Where?

A. Doylestown.

Q. Mrs. Bliss, do you know Mr. Achey, the defense attorney?

A. Casually.

Q. He has never represented you as attorney?

A. No.

Q. Do you know Mr. Power, his associate?

A. I don't know him at all.

Q. Do you know Mr. Biester, the district attorney?

A. Casually, too.

Q. He has never represented you?

A. No.

Q. How about myself?

A. I know you just casually, too, but you never represented me.

Q. Mrs. Bliss, this case involves an occurrence in Feasterville in the lower end of Bucks County on the evening of December 22, 1947, involving four young men, one of whom, David Darcy, is now on trial, and in the course of which a man by the name of William Kelly was allegedly murdered. From that recitation of the facts have you heard of the case?

A. Why, I haven't read it in detail. I have read the headlines, but not in detail.

Q. And have you formed any opinion as to the guilt or innocence of this defendant?

A. No, no, I haven't because I haven't read it in (241) detail enough to know.

Q. Mrs. Bliss, did you know the deceased, William Kelly?

A. No.

Q. Do you know the defendant David Darcy?

A. No.

Q. Do you know either of their families?

A. Not any.

Q. What is the condition of your health, Mrs. Bliss?

A. Perfect, I think.

Q. You are not currently under the care of a physician?

A. Not at any time.

MR. CURTIN: Commonwealth passes the juror.

BY MR. ACHEY:

Q. Mrs. Bliss, have you ever sat on a jury before?

A. No, I haven't.

Q. You are aware that in this state the jury has the duty after finding a verdict of guilty of murder in the first degree to fix the penalty at either death or life imprisonment?

A. Yes.

Q. You say you have no scruples against capital punishment?

A. No, not whatever.

Q. And you have not formed any opinion as to the guilt or innocence of the defendant in this case by what you have read or conversed about the facts?

A. No, I really haven't. I haven't read enough (242) about it, as I said before; just the headlines.

Q. Would the outcome of the prior trial last week have any influence on your judgment in this case?

A. No. No.

MR. ACHEY: Defendant accepts the juror.

* * * * * * *

(254) ANN L. REED, sworn.

BY MR. CURTIN:

Q. Are you married or single?

A. Married.

Q. Mrs. Reed; where do you live?

(225) A. Penns Bark.

Q. How long have you lived there?

A. Ten years.

Q. What is your husband's occupation?

A. Insurance.

Q. Do you have any children?

A. Two.

Q. What are their ages?

A. One ten and one five.

Q. Who else lives in the household in addition to your husband and you and the children, if anyone?

A. My mother-in-law.

Q. Would she be in a position to take care of the two children in the event you proceeded as a juror in this case, if I told you it would take several days?

A. Yes, I believe so.

Q. Mrs. Reed, do you have any conscientious scruples against the imposition of the death penalty in murder cases?

A. No, not particularly.

Q. Do I understand, then, that if the facts as you heard them from the witnesses should warrant it and if the law as explained to you by the Court should warrant it you would have no scruples against rendering a verdict which would result in death for this defendant?

A. No.

(256) Q. You have no such scruples?

A. No.

Q. What is the condition of your health, Mrs. Reed?

A. Oh, it has been very good, as far as I know.

Q. You are not currently under the care of any physician?

A. No.

Q. Mrs. Reed, this case involves a matter, an occurrence, in Feasterville on the evening of December 22, 1947, in which four men were involved, one of whom, David Darey, is on trial, and in the course of which occurrence a man by the name of William Kelly was allegedly murdered. Do you know anything about that case?

A. I have been reading about it, yes.

Q. You read about it in the papers?

A. Yes, sir.

Q. Have you also discussed the case?

A. Oh, with my family, I suppose.

Q. As a result of what you have read and your discussions have you formed any opinion as to the guilt or innocence of this particular defendant, David Darey?

A. No.

Q. You have not?

A. No.

Q. Do you know Mr. Achey, the defense attorney?

A. No.

(257) Q. Do you know Mr. Power, his associate?

A. No.

Q. Do you know Mr. Biester, the district attorney?

A. No.

Q. Do you know me?

A. No.

Q. Do you know David Darey, the defendant?

A. No.

Q. Did you know the deceased, William Kelly?

A. No.

Q. Do you know either of their families?

A. No.

Q. How long did you say you have been a resident of Bucks County?

A. Oh, about twenty years, I guess.

Q. Do you have any occupation other than housewife?

A. No.

Q. Mrs. Reed, when I asked you as to whether you had any conscientious scruples against the death penalty you said "not particularly," as I understand it. What do you mean by that?

A. Oh, I don't know.

Q. Do you know what conscientious scruples are?

A. Yes. They are against putting anyone to death, isn't it?

Q. Conscientious scruples are something that (258) flows from your innermost being which makes you think something is either morally right or morally wrong. Do you have any such scruples in a case of this kind?

A. Well, I think that they—

Q. Yes or no rather than explain it.

A. No.

Q. You have no such scruples?

A. No.

Q. You would have no conscientious scruples which would prevent you from rendering such a verdict if the law and the facts should warrant it; is that correct?

A. Yes.

Q. What did you say your age was?

A. Twenty-eight.

MR. CURTIN: Commonwealth accepts.

THE COURT: Commonwealth passes?

MR. CURTIN: Yes.

BY MR. ACHEY:

Q. Mrs. Reed, you say your husband is in the insurance business?

A. Yes.

Q. Life insurance or all types?

A. Yes, all kinds.

Q. Where is his place of business?

A. Penns Park.

(259) Q. You have lived in Penns Park, you say, for ten years?

A. Yes.

Q. Were you born in Bucks County?

A. No. I was born in Philadelphia County.

Q. How long did you say you were married?

A. Seven years.

Q. Is your husband a veteran?

A. No.

Q. Were you a Waac or a Wave in the last War?

A. No.

Q. May I ask you, madam, in what papers you read about this previous trial?

A. Well, the Philadelphia Inquirer and the Doylestown Intelligencer.

Q. You have formed no opinion as to the guilt or innocence of David Darey?

A. No, I haven't.

Q. And from the outcome of the other trial you have formed no opinion?

A. No.

Q. You are willing to try this case and render a verdict under the evidence as presented in this particular case and under the instructions of the Court?

A. Yes.

MR. ACHEY: Defendant accepts the juror.

(260) MR. BIESTER: If the Court please, we think this is the proper time to select two alternate jurors in this case in the event that sickness or incapacity should overcome one of the twelve jurors in the box; I therefore ask that the jury be completed in the calling of two alternate jurors.

THE COURT: We will grant your request, and after the noon intermission we will proceed with the calling of two alternate jurors.

This jury will now be excused for the noon luncheon recess in the custody of the tip-staff, and we again remind you not to discuss this case during your intermission.

(The following discussion took place at sidebar, not in the hearing of the jury:)

THE COURT: You say you want to make a motion before we issue a new venire?

MR. ACHEY: I can't make it until I know whether this panel is going to be exhausted. The purpose of my motion would not arise until the panel were exhausted.

MR. BEISTER: I don't think we can wait until the last juror is called.

MR. ACHEY: Then the purpose of my motion, Sir, is in view of the fact that the venire has been exhausted and this case being the second trial under a single bill of indictment where four defendants are indicted, I would move for a change of venue by reason of the fact that the jury panel has (261) been exhausted and the number of excuses that were given to jurors who were originally summoned in the number of 120 was prejudicial to the defendant and he was unable to draw the jurors out of the panel as originally summoned.

THE COURT: You are not making the motion at this time?

MR. ACHEY: I will make it if your Honor feels that it is proper at this time. It may be that we can draw these two other jurors.

THE COURT: We will wait until the panel is exhausted.

(263) WILLIAM F. HICKEY, sworn.

BY MR. CURTIN:

Q. Mr. Hickey, you live in Morrisville?

A. I do.

(264) Q. How long have you lived there, sir?

A. Eight years.

Q. And where did you live prior to that?

A. New Jersey.

Q. Are you married, sir?

A. I am.

Q. Do you have any children?

A. I do.

Q. Boys or girls?

A. One girl.

Q. And her age, please?

A. Twenty.

Q. What is your age?

A. Forty-five.

Q. Mr. Hickey, do you have any conscientious scruples against the imposition of the death penalty in murder cases?

A. No.

Q. Do I understand, then, that in the event that the evidence as given by the witnesses and the law as laid down by the Court should warrant it you would have no conscientious scruples which would prevent you from rendering a verdict resulting in death?

A. No.

Q. What is your occupation, sir?

A. I am a construction supervisor for the telephone company.

(265) Q. Bell Telephone Company of New Jersey?

A. That is right.

Q. Mr. Hickey, do you know Mr. Achey, the defense attorney?

A. No, I do not.

Q. Do you know Mr. Power, his associate?

A. I do not.

Q. Do you know Mr. Biester, the district attorney?

A. No, sir.

Q. Do you know me?

A. I don't think so.

Q. This case, sir, involves a matter in Feasterville on the evening of December 22, 1947, in which, four men were involved, one of whom, David Darcy, is now on trial, and in which there was an alleged murder of one William Kelly. Do you know anything of that case?

A. Well, I saw headlines in the paper.

Q. Did you discuss the case in additions to seeing headlines in the paper?

A. Not to any extent.

Q. You said you did not?

A. No, I did not.

Q. Have you any opinion as to the guilt or innocence of this defendant, David Darcy?

A. I don't.

Q. Do you know David Darcy, this defendant?

(266) A. I do not.

Q. Did you know the deceased, William Kelly?

A. No, sir.

Q. Do you know either of their families?

A. No, sir.

Q. What is your condition of health, sir?

A. I think it is good.

Q. You are not presently under the care of any physician?

A. No, sir.

MR. CURTIN: Commonwealth passes the juror.

BY MR. ACHEY:

Q. Where does your field of work lie? You said

you are connected with the Bell Telephone Company of New Jersey.

A. All over southern New Jersey.

Q. You are not active in Bucks County, then, are you?

A. No, sir.

Q. Out of what office do you work?

A. Trenton.

Q. Are you a member of the town or borough council in Morrisville?

A. I am not.

Q. Have you ever held a position or followed the occupation of investigator?

A. I have not.

(267) Q. Ever been a justice of the peace?

A. No, sir.

Q. You say you have read about this case which was tried last week?

A. I did not read about a case tried last week.

Q. Then you are not familiar with the facts in connection with this case?

A. No.

Q. Did you ever serve as a juror before?

A. Not in Pennsylvania.

Q. How long have you lived in Morrisville?

A. Eight years.

Q. Is all of your time taken up with your duties as construction superintendent?

A. That is right.

Q. You have the area from Trenton to Cape May?

A. That is right.

Q. All the way over to the coast?

A. That is right.

MR. ACHEY: Defense accepts the juror.

(268) VIRGINIA BRILLMAN, sworn.

BY MR. ACHEY:

Q. Is it Miss or Mrs.?

A. Mrs.

Q. You live in Point Pleasant?

A. Yes.

Q. What is your husband's name?

A. William.

Q. Are you employed?

A. I am not right now.

Q. How long have you been married?

A. Four years.

Q. Have any children?

A. No.

Q. Have you read anything in the papers concerning this case?

(269) A. Some.

Q. Have you formed any opinion as to the guilt or innocence of this defendant?

A. No, I haven't.

Q. Do you have any conscientious scruples against capital punishment?

A. No, sir.

Q. What religious faith do you belong to?

A. Protestant.

Q. If you were accepted as a juror in this case would you be willing to render a verdict from the evidence as you heard it from the witnesses and under the instructions of the Court?

A. Yes, I would.

MR. ACHEY: No challenge.

BY MR. CURTIN:

Q. What is the condition of your health?

A. Well, I have been doctoring, but I am not awful sick.

Q. Are you currently under the care of a doctor?

A. Yes.

Q. Is your health such that it would be impossible for you to serve as a juror?

A. No, sir.

Q. For several days?

A. No, sir.

Q. What is your husband's occupation?

(270) A. Carpenter.

Q. Do you know Mr. Achey?

A. No, sir.

Q. Do you know Mr. Power?

A. No, sir.

Q. Do you know either Mr. Biester or myself?

A. No, sir.

MR. CURTIN: Commonwealth accepts the juror.

THE COURT: Are you ready to swear the jury?

MR. BIESTER: Commonwealth is ready, your Honor.

MR. ACHEY: Defense is ready.

THE COURT: First call the jury, then swear them.

(Jury sworn.)

(Alternates sworn.)

MR. ACHEY: I will object to the form of the oath as given to the alternates, Sir.

THE COURT: We will change it to meet your objection. William F. Hickey and Virginia Brillman stand up. I will administer this alternate oath.

(Alternate jurors sworn.)